LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 12 1963
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN N. METZ and MILES A. WHITE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES L. GUILMARTIN
GUILMARTIN and BARTEL
1527 Alfred I. du Pont Building
Miami 32, Florida

FULLER WARREN
811 Ainsley Building
Miami 32, Florida
Attorneys for Petitioners

STANLEY JAY BARTEL
GUILMARTIN and BARTEL
1527 Alfred I. du Pont Building
Miami 32, Florida
Of Counsel

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
Question One	2
Question Two	2
Question Three	3
Question Four	3
Question Five	3
Question Six	4
Question Seven	4
Question Eight	4
Question Nine	4
STATUTES INVOLVED	5
RECORD ON APPEAL	5
STATEMENT OF THE CASE	6
Illegal Search and Seizure	7
Burden of Proof As To Evidence Unlawfully Seized	13

INDEX (cont.)

	Page
Waiver of Objections To Tainted Evidence	15
Cumulative Trial Error	16
Impounding of Defense Files Before Conclusion of Trial	16
Failure To Record Inflammatory Summations	17
Supplemental Record On Appeal	17
REASONS FOR GRANTING THE WRIT	19
Search and Seizure	20
Burden of Proof As To Evidence Unlawfully Seized	22
Waiver of Objections To Tainted Evidence	23
Cumulative Trial Error	25
Impounding of Defense Files Before Conclusion of Trial	25
Failure To Record Inflammatory Summations	27
Supplemental Record On Appeal	29
CONCLUSION	34

INDEX (cont.)

	Page
APPENDIX	App. 1
Opinion of the Court of Appeals For the Fifth Circuit	App. 1
Constitutional Provisions and Statutes	App. 20
Constitution — Fourth Amendment	App. 20
Constitution — Fifth Amendment	App. 20
Constitution — Sixth Amendment	App. 20
28 U.S.C. §753(b)	App. 21
28 U.S.C. §2071	App. 22
28 U.S.C. §2106	App. 23
Federal Rules of Criminal Procedure	App. 23
Rule 2	App. 23
Rule 37(a) (1)	App. 23
Rule 39(a)	App. 24
Rule 39(b) (1)	App. 25
Rule 44	App. 25
Rule 51	App. 25
Rule 57(a)	App. 26

INDEX (cont.)

Page

Rule 57(b) ..... App. 26

Federal Rules of Civil Procedure ..... App. 26

Rule 75(a) ..... App. 26

Rule 75(d) ..... App. 27

Rule 75(h) ..... App. 27

Rule 75(n) ..... App. 28

Letter from Clerk, Court of Appeals for the Fifth Circuit, to Defense Counsel, dated May 17, 1962 ..... App. 29

Motion for Mis-Trial Before United States District Court ..... App. 31

TABLE OF CASES

	Page
Abel v. United States, 362 U.S. 217	21, 22
Ballard v. United States, 329 U.S. 187	34
Belt v. Holton, 197 F.2d 579	32
Berger v. United States, 295 U.S. 78	25
Bolger v. United States, 189 F.Supp. 237	22
Boyd v. United States, 116 U.S. 616	21
Brown v. United States, 314 F.2d 293	27, 28
Caniide v. United States, 250 F.2d 822	22
Chamdler v. Fretag, 348 U.S. 3	26
Chessman v. Teets, 354 U.S. 156	28
Cicenia v. LaGay, 357 U.S. 504	26
Coppedge v. United States, 369 U.S. 438	28
Dempsey v. Guaranty Trust Company of New York, 131 F.2d 103	32
Dowd v. United States, 340 U.S. 262	28
Draper v. United States, 358 U.S. 307	20
Drayton v. United States, 205 F.2d 35	21

TABLE OF CASES (cont.)

	Page
Elkins v. United States, 364 U.S. 206	20, 33
Ex parte Hawk, 321 U.S. 114	26
Gibson v. United States, 149 F.2d 381	22
Glasser v. United States, 315 U.S. 60	26
Go-Bart v. United States, 282 U.S. 344	21
Gouled v. United States, 255 U.S. 298	21
Gray v. Amerada Petroleum Corp., 145 F.2d 730	32
Grunewald v. United States, 353 U.S. 391	33
Harris v. United States, 331 U.S. 145, 867	21
Hawk v. Olson, 326 U.S. 271	26
Heath v. Helmick, 173 F.2d 157	32
House v. Mayo, 324 U.S. 42	26
Jennings v. United States, 19 F.R.D. 311	23
Johnson v. Zerbst, 304 U.S. 458	24, 26, 34
Jones v. United States, 362 U.S. 257	20, 22
Judd v. United States, 190 F.2d 649	22
Karwicki v. United States, 55 F.2d 225	22

TABLE OF CASES (cont.)

	Page
Keen v. Overseas Tankship Corp., 194 F.2d 515	24
Keiningham v. United States, 287 F.2d 126	21
Kent v. Sanford, 121 F.2d 216	26
Kovach v. United States, 53 F.2d 639	22
Lawn v. United States, 355 U.S. 339	24
Marshall v. United States, 360 U.S. 310	33
Martin v. United States, 182 F.2d 225	26
Nanny v. United States, 301 F.2d 57	26
Nardone v. United States, 308 U.S. 338	23
Nathanson v. United States, 290 U.S. 41	20
Neuslein v. District of Columbia, 115 F.2d 690	22
Olmstead v. United States, 277 U.S. 438	21
Page v. United States, 282 F.2d 807	23
Parrott v. United States, 314 F.2d 46	27
Poole v. United States, 250 F.2d 396	27
Powell v. Alabama, 287 U.S. 45	26
Quinn v. United States, 203 F.2d 20	28

TABLE OF CASES (cont.)

	Page
Rosenberg v. United States, 346 U.S. 273	33
Smith v. Cleveland Pneumatic Tool Co., 173 F.2d 775	32
State v. Weldon, 74 S.E. 43	27
Stephens v. United States, 289 F.2d 308	27
United States v. Evans, 97 F.Supp. 95	20
United States v. Hill, 114 F.Supp. 441	20
United States v. Hinton, 219 F.2d 324	21
United States v. Kenny, 104 F.Supp. 691	21
United States v. Kidd, 153 F.Supp. 605	21
United States v. Lassoff, 147 F.Supp. 944	20
United States v. Lefkowitz, 285 U.S. 452	21
United States v. Lester, 21 F.R.D. 376	21
United States v. Maryland Casualty Company, 204 F.2d 914	32
United States v. Martin, 176 F.Supp. 262	22
United States v. Morgan, 346 U.S. 502	26
United States v. Munsingwear, Inc., 340 U.S. 36	33

TABLE OF CASES (cont.)

	Page
United States v. One 1949 Buick Sedanette, 112 F.Supp. 218	21
United States v. Pearce, 275 F.2d 318	20
United States v. Rabinowitz, 339 U.S. 56	21
United States v. Reckis, 119 F.Supp. 687	22
United States v. Reynolds, 111 F.Supp. 589	20
United States v. Richmond, 57 F.Supp. 903	21
United States v. Sands, 14 F.2d 670	21
United Sttaes v. Sinor, 238 F.2d 271	32
United States v. Venuto, 182 F.2d 519	27
United States v. Wheeler, 149 F.Supp. 445, 172 F.Supp. 278, 275 F.2d 94	23
United States v. Whiting, 311 F.2d 191	23
United States v. Wroblewski, 105 F.2d 444	21
Viereck v. United States, 318 U.S. 236	25
Waldron v. United States, 219 F.2d 37	23
Weeks v. United States, 232 U.S. 383	21

OTHER AUTHORITIES

	Page
United States Constitution	
Fourth Amendment	Passim
Fifth Amendment	Passim
Sixth Amendment	25
28 U.S.C. §753(b)	4, 5, 17, 18, 20, 27, 28, 29, 30, 31, 33
28 U.S.C. §1254(1)	2
28 U.S.C. §2071	5, 33
28 U.S.C. §2106	5, 29, 33
Federal Rules of Criminal Procedure	
Rule 2	5, 33
Rule 37(a)(1)	5, 30
Rule 37(c)	2
Rule 39(a)	5, 31
Rule 39(b)(1)	5, 30, 31
Rule 44	5, 26
Rule 51	5, 24
Rule 57(a)	5, 31

OTHER AUTHORITIES (cont.)

	Page
Rule 57(b)	5, 31
Federal Rules of Civil Procedure	
Rule 75	30
Rule 75(a)	5
Rule 75(d)	5
Rule 75(h)	5, 31
Rule 75(n)	5
Revised Rules of the Supreme Court Rule 22-2	2
4 Barron, Federal Practice and Procedure §§2331-2332	30
7 Moore's Federal Practice 3663	32

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

No.

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ and MILES A. WHITE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 24, 1963.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 317 F.2d 808, and appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 24, 1963. (R. 3375) A timely Petition for Rehearing was denied, without opinion, on September 12, 1963. (R. 3400) On October 12, 1963, this Court entered an order extending time to file a petition for writ of certiorari until November 11, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), Federal Rules of Criminal Procedure, Rule 37(c), and the Revised Rules of the Supreme Court of the United States, Rule 22-2.

QUESTIONS PRESENTED

The questions presented by this petition, in the sequence in which they arose below, are as follows:

Question One

Whether petitioners were denied their constitutional rights by trial court refusal to suppress evidence obtained from an illegal search and seizure.

Question Two

Where Federal agents took ten file cabinets of business records after illegal search and seizure, kept them for months without inventory or receipt, failed to produce these records, although subpoenaed, at the pretrial hearing on motion to suppress, and admitted the purpose of their search to have been to procure needed evidence, must petitioners point with precision to the

specific tainted evidence of which they complain, when they can nonetheless make a substantial showing of the use of tainted evidence to convict them.

Question Three

Where pre-trial objections to tainted evidence had been clearly overruled, and defense counsel, at the start of the trial, were assured by the trial court of a continuing objection to such tainted evidence, whether petitioners may be held to have waived their objections to such evidence, by failure to make repeated, renewed objections during trial.

Question Four

Whether petitioners were given a fair trial under the test of cumulative error, where venue ought to have been transferred to vitiate substantial adverse pre-trial publicity, where the trial court inadequately cautioned the jury concerning reading of newspapers during trial, where improper and prejudicial questions and comments involving unrelated crimes, appeals to passion, and other inflammatory remarks were repeatedly allowed, over objection, during trial, and where the court reporter failed to record and transcribe summations of counsel, during which the prosecution culminated its inflammatory and prejudicial appeal to the jury.

Question Five

Whether petitioners were denied a fair trial and their right to effective assistance of counsel, where the entire files of defendants, including work products of

defense counsel, were seized and impounded before the conclusion of the trial.

Question Six

Whether, under 28 U.S.C., Section 753(b), the failure of the court reporter to record and transcribe summations of counsel, during which the prosecution made improper and inflammatory appeals to the jury, requires the granting of a new trial.

Question Seven

Whether a charge by defense counsel of substantial error during the prosecution's summation to the jury, requires a remand by the appellate court for a hearing as to prejudice, where the court reporter failed to record or transcribe summations of counsel pursuant to the mandatory provisions of 28 U.S.C., Section 753(b).

Question Eight

Whether the prosecution, over one year after trial, and after petitioners' briefs on appeal had been filed and served may be permitted to "supplement" the trial record in a criminal case, in contravention of the plain intent of 28 U.S.C., Section 753(b), so as to add newly-minted material, in an effort to cure error.

Question Nine

Whether petitioners are entitled to a preliminary ruling from the Court of Appeals, when timely and properly requested, as to the propriety of supplementing

the record on appeal, where new matter is sought to be added to the record, which relates to vital, constitutional issues already on appeal, including, *inter alia*, illegal search and seizure, impounding of defense files, failure to record trial court proceedings and inflammatory summations of counsel.

STATUTES INVOLVED

The statutes here involved include pertinent portions of the Fourth, Fifth and Sixth Amendments to the United States Constitution, 28 U.S.C., Sections 753(b), 2071 and 2106, Federal Rules of Criminal Procedure, Rules 2, 37(a)(1), 39(a), 39(b)(1), 44, 51, 57(a) and 57(b), Federal Rules of Civil Procedure, Rules 75(a), 75(d), 75(h), and 75(n), all of which are set forth in the appendix hereto.

RECORD ON APPEAL

Only one certified copy of the record in this cause has been filed together with this petition. Included within that certified record are certified copies of the various briefs of the parties before the Court of Appeals below. This has been necessitated because the opinion below overlooks contentions of counsel on appeal that were, in fact, urged, namely, a specific contention as to misconduct during the prosecution's summation to the jury (Reply Brief of John Milton Addison, et al. Pages 15-16; App. 2, Ex. "B;" Petition for Rehearing, Page 2) and a description of specific tainted evidence wrongfully used to convict petitioners (Reply Brief of John Milton Addison, et al. Pages 18-25; Petition for Rehearing, Pages 9-10).

STATEMENT OF THE CASE

Petitioners were indicted on May 16, 1960, in twenty-four counts, on charges of stock fraud, mail fraud, conspiracy and the sale of unregistered securities (R. 2417).

On December 5, 1960, an extensive pre-trial hearing was held (R. 2519) on petitioners' motion to suppress evidence (R. 2512), which was denied.

Following a trial, which lasted approximately four weeks, and before the case was given to the jury, the prosecution dismissed ten counts of the indictment. The jury acquitted petitioners on two additional counts of the indictment, involving the sale of unregistered securities.

Petitioners were found guilty by the jury on a total of twelve counts of the twenty-four count indictment, involving stock fraud, mail fraud and conspiracy. 15 U.S.C., Section 77(q)(a), 18 U.S.C., Section 1341 and 18 U.S.C., Section 371. Thereafter, petitioners were sentenced to differing terms, the shortest being two years and the longest, in the case of Addison, being fifteen years. Fines were also imposed, petitioner Addison drawing the highest, a fine of $36,000.00.

The basic charge which the government sought to prove at trial was that petitioners engaged in a scheme to sell, and sold, through the mail, interests in uranium, timber and nickel properties and projects by fraudulent misrepresentations and with intent to defraud.

At trial and before the Court of Appeals, petitioners

challenged the adequacy of the indictment and of the evidence to support their convictions.

Petitioners do not propose to abandon these issues of substantive law. They are mindful, however, of the novelty and importance of the procedural issues in this case and wish initially to direct this petition to these issues of procedural law.

Petitioners contend in this petition that they have been deprived of their constitutional rights and of a fair trial in so flagrant a fashion and at so many stages of the proceedings below that this Court, in the exercise of its supervisory powers over the administration of criminal justice in the federal courts, should grant this petition and correct these substantial departures from the accepted and usual course of federal judicial proceedings.

Illegal Search and Seizure

On or before June 10, 1959, investigators from the District Attorney's office of Bexar County, Texas, learned that some of the petitioners were the occupants of certain rooms at the Gunter Hotel in San Antonio, Texas (R. 2525, 2527, 2529, 2554). One of their number secured a search warrant directed to Rooms 526 and 528 of that Hotel which were described as being in the control and charge of "Dr. R. C. Olson and John Milton Addison". (Ibid.) The warrant was predicated on Article 1410 of the Penal Code of the State of Texas, which involved the crime of "theft". (R. 2525, 2529, 2561) The warrant recited that state indictments for theft had been returned against John Milton Addison and Dan Nance prior to the

date of the warrant (R. 2525, 2529). It described the premises as a place which contained "letters, books, contracts, photographic slides, film projector, and other paraphernalia used in the perpetration of various swindles in violation of Article 1410, Penal Code of the State of Texas." (R. 2525)

State officers, with this warrant in hand, approached the management of the Gunter Hotel to gain entrance to the above-described rooms. After some objection by hotel officials, involving the description of the premises, the State officers obtained a second warrant, which issued to search Rooms 405, 407, 409, 526 and 528 (R. 2555, 2556). This warrant was otherwise a replica of the first warrant (Ibid.)

These warrants issued on affidavits predicated entirely on information and belief. (R. 2525-2526, 2529-2530). Although the affidavits referred to Article 1410 of the Penal Code of the State of Texas, which concerns theft (R. 2561), the scope of the theft was not described in the affidavits. In addition, the crime of theft was admittedly not the subject matter of the investigation which these State officials were then conducting, but rather, it was a "swindle" which was under investigation. (R. 2525) Article 1410, the theft provision, was recited as the criminal charge, despite the fact that Texas had separate provisions dealing with "swindles", Article 1545, as well as Blue Sky provisions, Texas Securities Act of 1957, Section 29, which were available to form the basis of a valid charge.

Not only did the affidavits proceed entirely on information and belief (R. 2557) and under the wrong

statute (R. 2573), but they sought authority to search the premises under the control of one Olson (R. 2525). Nowhere in the affidavits or warrants, however, was Olson in any way charged with wrongdoing. (R. 2560)

Armed with these warrants, State Agents obtained keys from the management of the Gunter Hotel and not only searched the rooms of Addison, Olson and Nance, but also of three additional, but unmentioned parties, Agnes M. Carver, Lester Smith and James D. Scarborough. (R. 2550-2554) The State Agents seized ten black file cabinets (R. 2533, 2543) containing, *inter alia*, Addison's person records (R. 2562), lenders' notes, four or five hundred sets of contracts, affidavits, letters, telegrams, lenders' lists and other evidentiary material (R. 2533, 2534, 2544-2545, 2562-2563). A typewriter was taken, a briefcase (R. 2542, 2545) some plans (R. 2550) and many other loose items found were seized and carried off (R. 2556).

Although the warrants were predicated on the crime of theft, the officers seizing the property made no effort to determine which, if any, of the documents had been stolen (R. 2561-2562) Moreover, no proof was ever introduced below tending to show that any of these items had been stolen.

Shortly before the conclusion of the search, which began while occupants of the rooms were out, Olson, who was named in the warrants, returned. (R. 2553) When the State Agents left the premises, however, no receipt was given him for the documents and other evidentiary material seized (R. 2571-2572), nor was a copy of an in-

ventory ever made or delivered to any of the occupants of the rooms that were searched. (R. 2571-2572)

On the day following this search and seizure, Federal officials appeared on the scene and began to go through the materials seized. (R. 2607-2609) Subsequently, Federal officials made copies of correspondence, studied the files, visited witnesses whose names were secured from the seized material, and retained these materials in their possession for almost six months. The Federal Grand Jury, which indicted the petitioners below, subpoenaed this tainted material, which was thereafter kept in Federal custody for investigators' use, study and presentation before the Grand Jury which rendered the instant indictment. (R. 2537-2538, 2540, 2546-2549, 2552, 2563-2566)

When the custodians of the seized material were subpoenaed to appear before the court below, at the hearing on petitioners' motion to suppress, the ten black filing cabinets had somehow been reduced to two black file cabinets (R. 2528, 2532-2533). Neither State officials nor Federal officials could clearly account for the then whereabouts of any evidentiary materials seized. (R. 2522 et seq.)

On June 24-26, 1959, Addison was subpoenaed to appear before the United States Securities and Exchange Commission in connection with the pre-trial investigation of this case. (R. 2574-2575) At that time, he was under indictment by the State of Texas for the similar subject matter which is the basis for the action here pending. (He was later acquitted.) While on the stand, and testifying with respect to the matters under investigation, he

was asked by officials of the United States Securities and Exchange Commission if he would permit them to see his personal records and files.

At the time of this request, Addison was not told by these Federal officials that they had already had free and extensive access to these records and had been investigating him beforehand, nor was he told that they had copied documents obtained from the search and seizure (R. 2589-2590, 2619-2620). It was strongly implied by the inquiring officer that, unless Addison consented to the Federal access to these records, his State trial would be delayed (R. 2580, 2591-92, 2618-2621). Under these pressures, Addison gave a conditional consent to Federal officials to look at his personal records, namely, that he would let them be seen at the conclusion of the State trial, but only if his state court trial scheduled for August 21, 1959 was not delayed, whether by the Federal authorities or otherwise. The trial was in fact delayed, however, and his records were never returned to him. *(Ibid.)*

On the evening before the hearing on petitioners' motion to suppress, a Federal Internal Revenue investigator prepared a purported "list of lenders" whose names he claimed the government had had from independent investigation prior to the search and seizure (R. 2614). The list was prepared from memory by a Revenue Agent, a year and a half after the seizure, under the "supervision" of an SEC agent, but without any explanation as to how a Revenue Agent could know the extent of success of an independent SEC investigation as of June 10, 1959 (R. 2585, 2614-2616). Nevertheless, over objection, the trial court permitted this so-called "list" to be admit-

ted, and presumably took the purported list into account in making its adverse determination (R. 2616).

The errors urged with respect to this search and seizure may be summarized as follows:

1. Illegal search of the premises of R. C. Olson on an affidavit and warrant which recited a theft indictment against Dan Nance.

2. Illegality of search and seizure predicated on a theft charge, which was not the subject matter of either the state indictment or the investigation.

3. Illegality of the search of rooms of Nance, Carver, Smith and Scarborough, who were never shown in either affidavits or warrants to be in the employ of or under the control of Addison or Olson.

4. Failure to set forth the factual nature of the alleged "swindle" and to connect any of the persons whose rooms were searched with any such "swindle."

5. Seizure of property of Agnes M. Carver, not named in the warrant, and nowhere connected with any theft or swindle (R. 2550).

6. Illegality of seizure of personal records.

7. Illegality of seizure of purely evidentiary matters.

8. Illegality of general exploratory search and seizure.

9. Invalid warrant, the same not being based upon probable cause.

10. Invalid warrant, the same predicated on affidavits entirely upon information and belief.

11. Failure to establish that any of the evidence seized in any way related to a charge of theft or was stolen property.

12. Failure to give a receipt for or to inventory the evidence seized.

The government, on appeal, made no effort to contravene petitioners' argument that the aforedescribed search and seizure was illegal (Brief for Appellee, Point II, pp. 79-106; Summarization of Appellee's Original Brief, pp. 12-24). The court of Appeals, however, did not rule upon the legality of the search and seizure, and accordingly, petitioners are compelled to re-urge their position with respect to the same, so as to seek their requested relief from this Court.

Burden of Proof as to Evidence Unlawfully Seized and The Fruits Thereof

The wholesale confiscation, and seeming disappearance of eight file cabinets of illegally seized records, made it extremely difficult for petitioners to point below with precision to the tainted evidence of which they complained. Unfortunately, the Court of Appeals failed entirely to take account of this factor.

The testimony, however, at the hearing on motion

to suppress, established that ten full file cabinets containing four or five hundred sets of contracts, lenders' notes, affidavits, letters, telegrams, lenders' lists and other evidentiary material were seized, studied and copied by Federal officials during the course of some six months.

Petitioners tried to subpoena all of the illegally seized evidence at the hearing on motion to suppress, so as to be able to make a strong showing of tainted evidence, but the subpoenaed officials, who had already invaded petitioners' constitutional rights in the seizure itself, were unable or unwilling to account for the whereabouts of the eight file cabinets of records.

The chief investigator for the prosecution admitted in connection with the illegal search and seizure that:

> "What we were looking for was jurisdictional evidence, letters that had gone through the mail." (R. 2598)

He further volunteered:

> "Frankly, we wanted to find some letters that had gone through the mail." (R. 2599)

This constituted a clear admission that the illegally seized evidence was badly needed by the prosecution and used to get leads to witnesses whose own copies of these mailings could be used to convict petitioners.

The Court of Appeals side-stepped petitioners' complaints concerning the illegal search and seizure, on the theory that petitioners failed to sustain their burden of

pointing to the specific evidence which was illegally seized (Opinion, pp. 7-8).

Petitioners submit, however, that where there was a wholesale seizure of evidence described with considerable particularity, where the prosecution failed to produce the evidence under seizure so as to enable petitioners at the hearing on motion to suppress to point with complete precision to what had been seized, and where the prosecution's chief investigator admitted the need for and, inferentially, the use of the seized evidence, that petitioners satisfactorily sustained any burden which may properly be placed upon them under the Constitution and the case law.

In connection therewith, it must be emphasized that, in the Reply Brief of Appellants, at pages 18-25, petitioners pointed with considerable specificity to the tainted evidence wrongfully used to convict them. The Court of Appeals, however, appears to have overlooked this in its opinion (Page 6). (See Petition for Rehearing, Point V, pp. 9-10)

Waiver of Objections to Tainted Evidence

Petitioners assert that the decision below is erroneous, and in direct conflict with decisions of other Courts of Appeals, in holding that petitioners had waived their objections to the tainted evidence by failure to renew these objections at trial, particularly in view of a trial court assurance to defense counsel of a continuing objection to such evidence that would carry through the trial. (R. 28)

Cumulative Trial Error

Petitioners assert, relying upon decisions, that they were denied a fair trial below because of the cumulative effect of error which prejudiced their cause before the jury. The jurors were drawn from an area which had been saturated by heavy adverse pre-trial publicity (R. 2761-2767). The trial court inadequately cautioned this jury concerning the reading of newspapers during trial (R. 23-25), and, at one point, even complimented the newspapers, in open court and before the jury, for their coverage of the trial (R. 2408). (See Point IV, Brief of John Milton Addison, et al., pp. 52-60). The trial court allowed the jury to hear, over strenuous objection, improper and prejudicial questions and comments involving unrelated crimes, appeals to passion, and other inflammatory remarks. (R. 160, 163-164, 246-249, 667-680, 684, 740-741, 766-767, 817, 843-844, 1058-1059, 1092, 1800-1801, 1808-1909, 2083-2084,2088). Finally, the court reporter, in contravention of the mandatory requirement in 28 U.S.C., Section 753(b), that all proceedings in a criminal case be recorded and transcribed, failed to take down summations of counsel, during which the prosecution culminated its inflammatory and prejudicial appeal to the jury.

The cumulative effect of the foregoing errors denied petitioners a fair jury trial as guaranteed by the Constitution.

Impounding of Defense Files Before Conclusion of Trial

Petitioners complain of a novel, unprecedented and flagrant interference with their constitutional rights be-

low, in that their entire files, including work products of defense counsel, were allowed to be seized and impounded by Federal officials before the conclusion of the trial, in contravention of their right to a fair trial and to effective assistance of counsel. (See Motion for Mistrial, R. 2790-91, reprinted in the appendix hereto)

Failure to Record Inflammatory Summations

Petitioners strenuously assert, citing a conflict in decisions, that they are entitled to a new trial, under 28 U.S.C., Section 753(b), because the court reporter below failed to record and transcribe summations of counsel, during which the prosecution made improper and inflammatory appeals to the jury. At minimum, and in reliance upon decisions of other courts of appeals, they contend that they are entitled to have the appellate court remand the cause for a hearing as to prejudice, where they have charged the commission of prejudicial error during summations unrecorded by the court reporter.

Supplemental Record on Appeal

Petitioners' final complaints relate to an unprecedented development which occurred long after trial. After petitioners' appellate briefs on appeal had been filed in the Court of Appeals, and in an effort to cure errors charged in petitioners' appellate brief, the government, without securing leave of the appellate court, and in contravention of the plain intent of 28 U.S.C., Section 753(b), was permitted by the trial court, over objections of defense counsel, to "supplement" the record on appeal. The government immediately relied upon this supplementary record in its brief on appeal.

Petitioners, in turn, promptly moved before the Court of Appeals to strike the supplementary record and the portions of the government's brief on appeal which relied upon that record. (R. 3283, 3312). Petitioners took the position that neither 28 U.S.C., Section 753(b), nor the Federal Rules of Criminal Procedure permitted supplementation of the record to add the material contained in that supplemental record.

This newly added material included an effort to close gaps in the government's testimony at the pre-trial hearing on motion to suppress; an attempt by the court reporter to recite from memory what occured during the summations of counsel that were unreported; and an attempt by a Deputy United States Marshal to prove time of service of an impounding order, though, in fact, by the very terms of the order, the impounding and seizure had already occurred. The newly added material also included other self-serving affidavits and statements prepared by the government and filed in this supplemental record, whose plain intent was to cure error apparent from the orginal record on appeal (R. 2895 et seq.).

Because of this unprecedented effort to supplement a criminal trial record long after trial, not authorized by any statute or construction thereof, and because this supplemental record related to vital constitutional issues on appeal, petitioners requested of the Court of Appeals that they be given an immediate ruling on the propriety of the supplemental proceeding, in which they had refrained from offering any contravening testimony or affidavits of their own.

The Clerk of the Court of Appeals, speaking for the

Court, informed petitioners' counsel that a separate hearing on their motions to strike was not available, but did assure counsel that if the government's supplementation was deemed proper, petitioners would be given an adequate opportunity to introduce contravening evidence before any final determination of the case by the Court of Appeals. (This letter is reprinted in the appendix hereto) (App. 29).

The Court of Appeals rendered its opinion, candidly admitting that it was doing so without ruling on the propriety of the government's effort to "supplement" the record on appeal. Abandoning its intent, however, as the opinion itself reveals, the Court of Appeals relied heavily in its determination upon the very evidence adduced at the supplemental hearing, the propriety of which the petitioners had attacked. (Opinion, pp. 4, 6-8, 18)

In their Petition for Rehearing, petitioners pointed out to the Court of Appeals that it had overlooked the prior assurances to defense counsel that they would be given an opportunity to introduce contravening evidence of their own. They also complained of reliance by the Court of Appeals upon the supplemental record without ruling upon the propriety of this supplementation. (Petition for Rehearing, Points IV-V, pp. 8-11) The Petition for Rehearing, however, was denied without opinion. (R. 3400)

REASONS FOR GRANTING THE WRIT

The petition should be granted to consider questions of recurring importance in the administration of justice in the Federal courts. These questions arise in the con-

text of the Federal Rules of Criminal Procedure and the Court Reporter Act, 28 U.S.C., Section 753(b), and involve the fundamental rights of an accused to be fairly tried by lawful evidence in a prosecution by the Federal government.

Search and Seizure

The failure of the court below to strike down the illegal search and seizure constitutes a substantial departure from the usual and accepted standards of Federal criminal justice.

Federal agents may no longer use the fruits of an illegal search and seizure by state agents, nor may such evidence be admitted in a Federal criminal trial. **Elkins** v. **United States**, 364 U.S. 206.

A warrant based upon an affidavit made solely on information and belief, uncorroborated by facts and circumstances that would establish probable cause, is insufficient to authorize a search and seizure. **Nathanson** v. **United States**, 290 U.S. 41; **Draper** v. **United States**, 358 U.S. 307; **Jones** v. **United States**, 362 U.S. 257, 260-271. See also **United States** v. **Reynolds**, 111 F.Supp. 589; **United States** v. **Lassoff**, 147 F.Supp. 944; **United States** v. **Hill**, 114 F.Supp. 441; **United States** v. **Evans**, 97 F.Supp. 95. The decision below on this point is in conflict with that of the Seventh Circuit in **United States** v. **Pearce**, 275 F.2d 318.

The search below violated settled requirements of particularity as to persons, items and place to be searched or seized, and as to the purpose and geographic limitations

of an authorized search. Decisions of the Seventh Circuit in **United States** v. **Wroblewski**, 105 F.2d 444 and **United States** v. **Hinton**, 219 F.2d 324, as well as the Court of Appeals for the District of Columbia in **Keiningham** v. **United States**, 287 F.2d 126, are in probable conflict with the instant case. Cf. **United States** v. **Lester**, 21 F.R.D. 376; **United States** v. **Kenny**, 164 F.Supp. 691; **United States** v. **Sands**, 14 F.2d 670; **United States** v. **One 1949 Buick Sedanette**, 112 F.Supp. 218.

The search below also violated the settled rule of this Court against seizure of private, personal papers. **Boyd** v. **United States**, 116 U.S. 616; **Weeks** v. **United States**, 232 U.S. 383. See also; **United States** v. **Richmond**, 57 F.Supp. 903.

A general exploratory search is not to be permitted. **Drayton** v. **United States**, 205 F.2d 35; **United States** v. **Kidd**, 153 F.Supp. 605.

The search below was admittedly made for the purpose of securing incriminating evidence, contrary to the prohibition long established in this Court. **Gouled** v. **United States**, 255 U.S. 298; **Go-Bart** v. **United States**, 282 U.S. 344; **United States** v. **Lefkowitz**, 285 U.S. 452; **Harris** v. **United States**, 331 U.S. 145, 867; **Abel** v. **United States**, 362 U.S. 217.

The use of a trumped-up state charge for theft, as a means of gaining access to rooms to gather evidence for a criminal case, ought not to be condoned. Cf. Dissenting opinion by Frankfurter and Jackson, J.J., **United States** v. **Rabinowitz**, 339 U.S. 56, 82; dissenting opinion, Brandeis, J., **Olmstead** v. **United States**, 277 U.S. 438, 485.

The suggestion in the opinion below (Page 8, Note 2) that Addison consented to the unconstitutional search and seizure is contrary to settled law. Consent may not be implied where obtained by misrepresentations by government agents or by trick: **Gibson** v. **United States,** 149 F.2d 381, explained in **United States** v. **Martin,** 176 F.Supp. 262, 267-268; **Bolger** v. **United States,** 189 F.Supp. 237, 253; **United States v. Reckis,** 119 F.Supp. 687.

The government has the burden of showing, by convincing evidence, that there was a truly voluntary and fully informed consent, without pressure or coercion, actual or implied. **Judd** v. **United States,** 190 F.2d 649, 652; **Kovach** v. **United States,** 53 F.2d 639; **Karwicki** v. **United States,** 55 F.2d 225; **Neuslein** v. **District of Columbia,** 115 F.2d 690; **Canide** v. **United States,** 250 F.2d 822.

There is also no question here as to standing of any of the petitioners to contest the illegal search and seizure. **Jones** v. **United States,** 362 U.S. 257.

Burden of Proof as to Evidence Unlawfully Seized and the Fruits Thereof

Petitioners have been unable to find cases from this Court or the various Courts of Appeals which deal with the disappearance of seized evidence between the time of seizure and their subpoena for hearing on motion to suppress. This issue would therefore appear to be one of first impression for this Court. In **Abel** v. **United States,** however, 362 U.S. 217, 226, this Court held that:

> "The preliminary stages of a criminal prosecution must be preserved in strict obedience to the safeguards and restrictions of the Constitution and the laws of United States."

By failing to produce evidence, originally seized unlawfully, when subpoenaed to do so at a hearing on motion to suppress, the participating agents have committed a second, but equally unconstitutional, invasion of the rights of the accused.

The opinion below, in placing an undue burden upon petitioners, is in conflict with the opinion of this Court in **Nardone** v. **United States**, 308 U.S. 338, at 341, where it was held that the proof of independent origin of lawful evidence must be made by the government, that it must be substantial, and that it must be based upon a timely record made by the prosecution.

Waiver of Objections to Tainted Evidence

The opinion below appears to be in direct conflict with decisions of the Second Circuit in **Waldron** v. **United States**, 219 F.2d 37; the Eighth Circuit in **Page** v. **United States**, 282 F.2d 807; the Third Circuit in **United States** v. **Wheeler**, 149 F.Supp. 445 and 172 F.Supp. 278, affirmed 275 F.2d 94; the Fourth Circuit in **United States** v. **Whiting**, 311 F.2d 191, cert. den. 83 S.Ct. 882, and the Court of Appeals for the District of Columbia in **Jennings** v. **United States**, 19 F.R.D. 311, affd. on other grounds 247 F.2d 784. Each of these decisions held that upon denial of pre-trial objections to tainted evidence, the accused may not, much less, need not, renew those objections at

trial. These courts reason that the ruling on motion to suppress becomes the controlling law of the case and to renew these objections during trial would be purely repetitive, inefficient and would involve the trial with tangential issues already determined in advance of the trial. *C.F.* Fed. Rules of Criminal Procedure, Rule 51.

These determinations go even further than what is needed in this case, namely, a ruling that petitioners did not waive their timely pre-trial objections by failing to renew them at trial.

The opinion below relied upon **Lawn** v. **United States**, 355 U.S. 339. That decision, however, 355 U.S. at 353, posits the general rule that pre-trial objections to tainted evidence need not be renewed at trial.

Moreover, the **Lawn** case is also distinguishable on its facts from the instant case. The trial judge in **Lawn**, when he denied the pre-trial motion to suppress, admonished defense counsel there to make their specific objections at trial.

By contrast, in the instant case the trial judge assured petitioners that their timely pre-trial objections made by motion to suppress would be continuing objections that would carry through the trial. Cf. **Keen** v. **Overseas Tankship Corp.**, 194 F.2d 515, a frequently cited decision of the Second Circuit.

This Court has held that every reasonable presumption must be indulged against waiver of constitutional rights, **Johnson** v. **Zerbst**, 304 U.S. 458, and it should hold, no waiver to have occurred in this case.

Cumulative Trial Error

The Sixth Amendment assures the accused "an impartial jury."

Persistent prosecution misconduct, with a probable cumulative effect upon the jury, may not be disregarded as inconsequential. **Berger** v. **United States**, 295 U.S. 78, 88-89.

A conviction procured through inflammatory and prejudicial remarks to the jury cannot be permitted to stand. **Viereck** v. **United States**, 318 U.S. 236.

This Court should therefore reverse these convictions, in the light of the cumulative trial error which occurred below.

Impounding of Defense Files Before Conclusion of Trial

The impounding of defense files below was protested by petitioners through their motion for mis-trial, which is reprinted in the appendix hereto. (App. 31)

The court reporter again failed to record this unusual and unprecedented trial development, and the timing of that impounding became the subject of heated controversy in connection with the supplemental record on appeal. (See Reply Brief of Appellants on the Government's Effort to Add to the Record After Trial, *passim*; Reply Brief of Appellants John Milton Addison, et al. Point VIII, Pages 41-48).

Petitioners have insisted that this impounding took place during the course of presentation of their defense case. Respondent denies this, but concedes that the impounding at least took place prior to summations of defense counsel at the close of the lengthy trial below.

This impounding of defense files, including work products of counsel, deprived petitioners of a fair trial and of effective assistance of counsel. **Glasser** v. **United States**, 315 U.S. 60, 70, 76; **Chandler** v. **Fretag**, 348 U.S. 3; **Powell** v. **Alabama**, 287 U.S. 45, 69; **Cicenia** v. **LaGay**, 357 U.S. 504; **Johnson** v. **Zerbst**, 304 U.S. 458; **United States** v. **Morgan**, 346 U.S. 502; **Hawk** v. **Olson**, 326 U.S. 271, 274; **House** v. **Mayo**, 324 U.S. 42.

This Court is committed to the doctrine that effective assistance of counsel is a constitutional requirement. **Ex parte Hawk**, 321 U.S. 114. Criminal Rule 44 requires counsel "at every stage in the proceeding."

The Courts of Appeals have dealt more directly than this Court with the portions of the trial during which the accused is entitled to this constitutional protection. The Tenth Circuit in **Nanny** v. **United States**, 301 F.2d 57, 58, held that:

> "[A]n accused is entitled to the aid of counsel throughout the trial proceedings."

In **Kent** v. **Sanford**, 121 F.2d 216, the Fifth Circuit held the right to counsel protected "until after the case was submitted to the jury."

That Circuit also requires counsel during the imposition of sentence. **Martin** v. **United States**, 182 F.2d 225, cert. den. 340 U.S. 892.

The Third Circuit, in **United States** v. **Venuto**, 182 F.2d 519, held an accused deprived of his constitutional right to consult counsel when he was prohibited from doing so during a recess, positing that the right to consult with counsel pertains during all stages of the trial. It is also noteworthy that in the **Venuto** case a motion for mistrial was held to be the proper remedy.

The only example, closely analogous to the outside interference here with the effective assistance of counsel, is a South Carolina case, **State** v. **Weldon**, 74 S.E. 43. In 1912, the Supreme Court of that State reversed a conviction on due process grounds, when a hostile crowd was permitted at trial to physically intervene between defense counsel and witnesses, the court there holding that this "substantially interfered" with the right of the accused to counsel.

This Court ought not to permit such a blatant inference with the defense of a criminal case as the impounding of defense files during trial.

Failure to Record Inflammatory Summations

The decision below is in conflict with decisions of the Ninth Circuit in **Brown** v. **United States**, 314 F.2d 293, the Tenth Circuit in **Parrott** v. **United States**, 314 F.2d 46, the Court of Appeals for the District of Columbia in **Poole** v. **United States**, 250 F.2d 396 and the Fifth Circuit in **Stephens** v. **United States**, 289 F.2d 308, with respect to the error in failing to abide by the Court Reporter Act, 28 U.S.C., Section 753(b), which requires the recording and transcribing of all proceedings in a criminal case, including summations of counsel.

This failure to record summations of counsel has recurred all too frequently within the last few years. In view of the plain intent of Congress in passing Section 753(b), this issue deserves the attention of, and a resolution by, this Court.

The question is not only of procedural, but of constitutional, dimension. An unrecorded summation makes it exceedingly difficult, as it did here, for the convicted to meet the normal burden of showing error on appeal. This thereby deprives the accused of his constitutional right to have his conviction reviewed. See **Coppedge** v. **United States**, 369 U.S. 438; **Dowd** v. **United States**, 340 U.S. 262; **Chessman** v. **Teets**, 354 U.S. 156.

The Court of Appeals for the District of Columbia, in **Quinn** v. **United States**, 203 F.2d 20, 25, reversed on other grounds, 349 U.S. 155, has held:

> "[O]ne of the substantial rights accorded a criminal defendant by statute in the Federal courts is the right of appeal."

That right is denied by deprivation of the benefit of the entire record.

The opinion below is also in direct conflict, in another material regard, with the decision of the Ninth Circuit in **Brown** v. **United States**, 314 F.2d 293. In **Brown**, although there were no suggested errors in the prosecution's summation, the Court of Appeals vacated a conviction and remanded to the trial court to determine whether the accused was prejudiced by the failure to record summations. This procedure is clearly within the

allowable scope of appellate authority under 28 U.S.C., Section 2106.

Petitioners seriously doubt whether it is feasible to attempt to piece together from memory many hours of summation of counsel. Indeed, this is presumably the reason why Congress required, in 28 U.S.C., Section 753(b), that all proceedings in a criminal case be recorded.

Nevertheless, the **Brown** decision clearly warrants the minimum relief sought, a remand to the lower court for a hearing as to prejudice.

Supplemental Record on Appeal

An additional, but vital question of procedural law is raised by this petition, namely, whether the statutes, the Rules of Criminal or Civil Procedure, or the principal of finality can permit the prosecution, long after trial, to add new material to the record on appeal in an effort to cure error below.

In making this determination, a number of important statutes and sections of the Rules of Criminal and Civil Procedure must be construed.

Petitioners take the position that the plain intent of 28 U.S.C., Section 753(b), which requires the recording of the entire proceedings in a criminal case, is to assure that nothing is to occur at the trial of a criminal case that is not recorded.

Respondent, in an effort to justify below the use of

supplemental proceedings, relied upon several misconstructions of the Rules of Criminal Procedure.

Respondent first argued that petitioners, in taking their appeal to the Court of Appeals, failed to designate any points on appeal. This, respondent said, warranted supplementation, on account of surprise.

Rule 37(a) (1) of the Federal Rules of Criminal Procedure, however, specifically abolished assignments of error, and it nowhere requires a statement of points. In 4 Barron, **Federal Practice and Procedure**, Sections 2331-2332, statements of points are said to be "outmoded procedure" in criminal appeals.

Respondent also assumed authority for its position by citing Rule 39(b)(1) of the Rules of Criminal Procedure, which adopts the Civil Rules of Procedure in connection with the "preparation and form of the record on appeal." Through this technique, respondent reached toward Rule 75 of the Federal Rules of Civil Procedure, and thereby argued that a statement of points is necessary in a criminal case. Through this same avenue, to wit, the adopting language of Criminal Rule 39(b)(1), respondent argued that the lower court, in a criminal case, has the power to create a supplemental record to be settled for ultimate use on appeal.

The procedure used in civil cases, however, for creating a supplemental record in the absence of an original record, can only make sense when construed together with 28 U.S.C., Section 753(b)(2) and (3). It is only because, in civil cases, there is no mandatory requirement

to record the entire proceedings, that a supplemental record may ever become necessary.

In criminal cases, 28 U.S.C., Section 753(b)(1) requires the recording of the entire proceedings. A supplementary record is not even contemplated in a criminal case.

It is also clear that the respondent, in endeavoring to reach for the civil procedure for supplementing the record, has misconstrued Rule 39(b)(1) of the Federal Rules of Criminal Procedure. That Rule, which adopts in part the Civil Rules pertaining to the record on appeal, only does so "except as otherwise provided in these rules".

Rule 57 of the Rules of Criminal Procedure, however, circumscribes the entirety of the criminal rules, in that they may not be inconsistent with any applicable statute. Here, again, we are led back to 28 U.S.C., Section 753(b).

The government's use of the supplementary proceedings below, without first obtaining leave from the Court of Appeals, also violated Rule 39(a) of the Federal Rules of Criminal Procedure, which places complete supervision and control of the proceedings on appeal in the appellate court, from the time the appeal is filed with its clerk.

It is also clear that the procedure used by the government below violated even the civil standards for supplementation of the record. Rule 75(h) of the Civil Rules authorizes supplementation only if an omission occurred "by error or accident".

No such "error or accident" was complained of by

the government as the excuse for their effort to supplement the record. Accordingly, even under civil standards, the government's supplementation here was improper. See **Smith** v. **Cleveland Pneumatic Tool Co.**, 173 F.2d 775; **Belt** v. **Holton**, 197 F.2d 579; **United States** v. **Maryland Casualty Company**, 204 F.2d 914; **United States** v. **Sinor**, 238 F.2d 271; **Gray** v. **Amerada Petroleum Corp.**, 145 F.2d 730; **Dempsey** v. **Guaranty Trust Company of New York**, 131 F.2d 103; **Heath** v. **Helmick**, 173 F.2d 157. See also, 7 **Moore's Federal Practice**, at page 3663.

Respondent has grossly distorted the intent and purpose of the procedural rules relating to the record on appeal, in an effort to justify an entirely unconstitutional and unwarranted effort to add new material to the record during the pendency of an appeal. The civil and criminal rules here involved are of constantly recurring significance in the Federal courts. Their construction and application should be clarified by this Court.

A criminal defendant, too, is entitled to know when the record has been completed and what, if anything, may later be added to it.

In the instant case, petitioners were especially needful of such assistance. As they mounted their appeal and charged error on the record, they were met with new record, unauthorized, which became an effective barrier to securing justice in their case.

Petitioners urge, for a further reason for the granting of a writ, that they were unfairly penalized in this case by the failure of the Court of Appeals below to rule on their timely filed motions to strike the supplemental

record and the brief of the government which relied upon such record.

Petitioners concede that, under ordinary circumstances, a Court of Appeals decision, as to whether it will render a preliminary, interlocutory ruling on an appeal, should not be disturbed.

Under 28 U.S.C., Section 2071, however, rules of the appellate courts must be consistent with acts of Congress (i.e. 28 U.S.C., Section 753(b)) and the rules of practice and procedure prescribed by the Supreme Court.

The Supreme Court, in turn, has broad supervisory power over the judgments of the lower Federal courts. 28 U.S.C., Section 2106; **United States** v. **Munsingwear, Inc.**, 340 U.S. 36.

In particular, this Court has assumed the special responsibility to supervise the administration and enforcement of criminal justice by the Federal judiciary. See **Rosenberg** v. **United States**, 346 U.S. 273, 324; **Grunewald** v. **United States**, 353 U.S. 391; **Marshall** v. **United States**, 360 U.S. 310; **Elkins** v **United States**, 364 U.S. 206.

This Court is empowered to, and should, review the denial below of the requested preliminary ruling on the supplementation of the record, since the failure to make such preliminary ruling has brought about a denial of a fair and proper appellate hearing on vital constitutional issues, thereby depriving petitioners of a just determination of this proceeding. See Federal Rules of Criminal Procedure, Rule 2.

CONCLUSION

A blatantly illegal search and seizure has gone uncorrected below. To this injury was added a secondary invasion of petitioners' constitutional rights, namely, the mysterious unavailability of eight file cabinets of seized records at the hearing on motion to suppress. This alone deserves close scrutiny by this Court.

The court below has also found petitioners to have waived their constitutional objections to tainted evidence, in disregard of contrary case law from other Courts of Appeals, and in the face of the presumption to the contrary enunciated by this Court in **Johnson** v. **Zerbst**, 304 U.S. 458.

Further, petitioners were denied an impartial jury below and were continuously prejudiced throughout the trial before this jury, through persistent prosecution misconduct that had to have had an adverse cumulative effect upon the jury.

The impounding of defense files substantially and prejudicially interfered with petitioners' presentation of their defense, in contravention of due process and of their right to effective assistance of counsel. To allow such an unprecedented occurrence in the Federal courts is to endanger the very basis of the jury system and the democratic ideal reflected in the processes of the courts. **Ballard** v. **United States**, 329 U.S. 187.

Inflammatory summations of counsel went unrecorded, in direct violation of the mandatory provisions of the United States Code. This further contributed to

the denial of petitioners' constitutional right to seek appellate relief, by making it exceedingly difficult to establish their showing of cumulative error at trial.

Finally, while petitioners were in the process of seeking appellate relief, the government sought, over strenuous objection, to cure many of their trial errors through an unauthorized, unilateral effort to re-try the issues.

Though petitioners made a timely effort to block the supplementation and, indeed, were assured of a ruling on the same before any adverse final determination by the Court of Appeals, petitioners' quest for relief was again unsuccessful.

These many errors in the administration of Federal criminal justice ought not to go uncorrected.

For the above and foregoing reasons, petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES L. GUILMARTIN
1527 Alfred I. duPont Building
Miami, Florida 33131

FULLER WARREN
811 Ainsley Building
Miami 32, Florida

APPENDIX

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 18902

JOHN MILTON ADDISON, ET AL.,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(May 24, 1963)

Before TUTTLE, Chief Judge, and WISDOM and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from conviction and sentence of the six appellants who were indicted and tried on twenty-four counts charging violation of the criminal sections of the Securities and Exchange Act, and charging violation of Title 18 U.S.C.A. Section 1341, dealing with the use of the mails in executing a scheme and artifice to defraud. Count twenty-four also charged a conspiracy on the part of the defendants and certain other persons to violate the statutes included in

the other counts of the indictment, a violation of 18 U.S.C.A. Section 371.

Following a trial, which lasted approximately four weeks, all of the appellants were found guilty on twelve counts, including the conspiracy count. They were found not guilty of counts twenty-two and twenty-three, dealing respectively with the delivery through the mails of a security after a sale thereof without there then being in effect a registration statement as to such security, and an offer to sell such securities through interstate commerce when there was not then in effect a registration as to such securities. The government dismissed counts five through ten and counts fifteen, seventeen, nineteen and twenty-one, after the conclusion of the evidence, and just prior to the submission of the case to the jury. Giving effect to the sentences that run concurrently, Addison stood convicted and sentenced to serve a total of fifteen years, and to pay fines totalling $36,000; White to serve seven years and one day, and to pay total fines of $20,000; Olson to serve two years and pay a $5,000 fine; Groom to serve five years; Scoggins to serve two years and pay a $5,000 fine; and Metz to serve two years and pay a $5,000 fine.

Principal reliance by all appellants is placed upon the fact that the official court reporter who reported the trial failed to comply with the part of the requirements of 28 U.S.C.A. Section 753(b).[1] To the extent that he did not

[1]This section provides as follows:

"One of the reporters appointed for each such court, shall attend at each session of the court and at every other proceeding designated by rule or order of the court, or by one of the judges, and shall record verbatim by shorthand, or by mechanical means: (1) All proceedings in criminal cases had in open court . . ."

take down by shorthand or by mechanical means the arguments of counsel, appellants take the bald and flat position that this requirement of the law is what they call "mandatory" and that the falure to comply with the statute works an automatic reversal for a new trial. This Court has held to the contrary. We stated in *Robert L. Strauss v. United States of America*, No. 19506, decided January 9, 1963, "We have never held that a failure to comply with the court reporter act is error per se, see *Fowler v. United States*, 5 Cir., No. 19458, slip opinion dated November 21, 1962; and *United States v. Taylor*, 4 Cir., 1962, 303 F. 2d 165. We do not do so now, and that in substance is the question before us."

In their appeal in this case, although appellants were represented in the trial by six lawyers, one of whom is still representing one of the appellants in this court, the record is silent as to any objection made or any motion of any kind filed with respect to any alleged impropriety during the course of the final arguments of counsel. Nor have the appellants in their original brief filed in this case attempted to state that any inflammatory or other improper comments were made by counsel during their summations. Obviously, even though a failure of the court reporter to report the arguments of counsel were an error per se, such error would not be available to appellants to work a reversal without a showing that it was prejudicial error. Rule 52(a) F. R. Crim. Proc. Without even the contention being made as to language used or other conduct of counsel that goes beyond the permitted range of oral argument, no effort is made to show that such failure prejudiced appellants. In such a situation the language used in the Strauss case is apposite:

> "Furthermore, no specific error or prejudice resulting therefrom is called to our attention. This is the very least that would be required under Stephens v. United States, 5 Cir., 1961, 289 F. 2d 308, where errors were specified, and where there was no record on which to test the claimed errors. To permit an appellant simply to claim error for failure to record under the act, without more, would eliminate the necessity of a showing of prejudice because of the error. The error may well have been harmless when considered in the light of the facts which were reported."

We now repeat what we stated in the Strauss case—There is no excuse for a court reporter's failure to comply with the requirements of the statute, unless the party waives the requirement. However, this does not work on automatic reversal.

Much of the attention of the parties on this appeal has been directed to the fact that when the United States was served with appellants' brief criticizing the failure of the reporter to record the oral arguments of counsel, the United States moved the trial court for a hearing on a motion to supplement the record in an effort by it to show what it contended had actually transpired with respect to this failure. The trial court granted such motion, and set the matter down for hearing. Testimony was taken, as a result of which the trial court found, as testified to by the court reporter, that counsel for each of the defendants in the trial court stated to him that they did not wish to have him report the oral arguments.

Appellants strongly attack the propriety of such a proceeding to supplement the record. Because of the failure of the appellants to allege any prejudice to them resulting from the failure of the trial court reporter to record the oral argument, we have disposed of this point on the broad ground that nothing is here presented that can avail the appellants on appeal. We thus do not pass on the question whether the record can be supplemented in such a manner. It is appropriate, however, to call attention to the fact that unless the record is supplemented, there is nothing to support the appellants' contention that the reporter failed to comply with the statute, since the statute *requires only that the reporter take down the testimony by shorthand or mechanical means*, there being no requirement that he transcribe it and include it as part of the record unless requested to do so. Thus the record, as presented to this court by the appellants, did not support their contention that the reporter had failed to comply with the statute. This is not the kind of matter that ordinarly appears in the record. Now, when the supplementary hearings disclose the fact that he did not do so, they also disclose the fact that his failure to do so was by the consent of the parties.

The next most vigorous argument made on behalf of appellants, Addison and Olson, relate to the failure of the trial court to suppress certain evidence which these appellants contend came into the possession of the United States from certain Texas state officials. The plain difficulty with this contention is that although the trial court conducted a long hearing prior to trial on a motion filed by these appellants to suppress as evidence in the case documents and papers alleged to have been taken from hotel

rooms of Addison and Olson by state officials, and by them turned over to the United States agents, no specific items were identified as being the basis of the motion to suppress, and the trial court did not enter an order finally granting or denying the motion, thus leaving it open to the appellants during the trial to offer their objection to any specific document or other bit of evidence which they considered to have been the subject of such illegal seizure.

Appellants write with great feeling about the ten filing cabinets that were taken from the hotel rooms, and it appears that their argument is pretty much the same as it was on the first point, that the mere fact that state officials took certain cabinets of papers from the rooms of Addison and Olson without legal warrant, completely destroys the trial thereafter conducted at which information testified to by witnesses, may also have been reflected in the filing cabinets. This they contend although no showing is made as to any item or document which, after having been examined by the United States following such seizure by the state officials, was introduced or testified to at the trial.

Upon this charge being made in the appellants' brief, the United States again filed its motion for taking testimony to supplement the record in order to complete the showing as to the alleged illegal search and seizure and its effect on the United States' prosecution. Appellants strenuously opposed such proceeding although appellants in their brief make the statement: "Should it so decide to do, this court has the power to vacate and remand to the court below for the taking of further testimony relative to the question of unreasonable search and seizure. Cf. *Jones v. United States*, 362 U. S. 257."

Again, we need not consider the propriety or legality of such a proceeding. We think the cases clearly hold that the burden is on the accused attacking the propriety of evidence used against him to establish the fact that it was in fact illegally obtained. This, we think, is the clear teaching of *Nardone v. United States*, 308 U. S. 338, and *Lawn v. United States*, 355 U. S. 339. In the Nardone case, a wire tapping case, the court said: "The facts do not 'become sacred and inaccessible. If knowledge of them is gained from independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it,' simply because it is used derivatively." 308 U. S. 338, 341. The court also said: "The trial judge must give the opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was the fruit of the poisonous tree." Since this case clearly states that it is open to the government to prove by untainted evidence the same facts that may have been shown by tainted evidence, there is clearly a burden on the party contending that the evidence is inadmissible on the trial to point specifically to the basis for the exclusion.

In *Lawn v. United States*, 355 U. S. 339, the Supreme Court stated:

> "At no time did counsel for petitioners point specifically to any evidence offered at the trial which they claimed was derived from materials furnished by petitioners before the 1952 grand jury [in violation of their constitutional rights]."

As in Nardone, the Court, it seems to us, clearly placed

upon the defendant in the criminal case the burden of showing that evidence derived as a result of leads or clues obtained from an unlawful search and seizure was actually used against him at his trial. No such showing was made in this case.[2]

Before dealing with the remaining grounds urged by the appellants for reversal of their convictions, we consider it necessary to relate in brief and summary form what we believe it can fairly be said the jury had a right to find under the evidence submitted to it. This, at the same time, will indicate the nature of the charges and the theory of the prosecution.

The jury could well believe that the defendants who were convicted devised and participated in a scheme to raise money from persons who could be "sold" on the possible prospects of great wealth from uranium mining, timber sales and nickel mining. There was ample evidence, with which all of these appellants were adequately connected, that this plan or scheme contemplated the representation to the prospective "investors" or "lenders," that the appellants or their interests, consisting of three corporations, owned or controlled extremely valuable uranium

[2]Once again, we need not consider the propriety of the subsequent hearing by the District Court for the purpose of supplementing the record against which appellants inveigh so heavily. However, it is of interest to note that upon such hearing the trial court made an express finding that none of the materials seized by the State Agents, and later shown to the United States, were actually introduced or formed the basis for the proof offered by the United States on the trial of these appellants. Moreover, the District Court found that appellant, Addison, had expressly consented to the reviewing of this seized material by the United States, and no effort was made to distinguish between the materials seized from Addison and those seized from or claimed by Olson.

properties, that they owned or controlled equipment called the "Benson Uranium Upgrader" which at a total cost of some $165,000 could produce enough usable uranium, known as "yellow cake" (the term for the refined uranium product purchased by the Atomic Energy Commission) to produce profits of as much as $86,000 per day; that the appellants needed a very small amount of money, in some instances some $17,000 and in others less than $50,000, to complete the reworking of the Benson Uranium Upgrader so that it could immediately begin to produce this wealth for the participants; that the investors or lenders eagerly made money available to the appellants principally in return for promissory notes, but with promises, either expressed in an agreement in writing or by verbal assurances, of added rewards, and that in the specific instances charged the United States Mails were used in connection with the acquisition of the funds or the mailing of the papers connected with the scheme. The jury could also believe from the copious testimony to that effect that the representations as to the character of the properties touching on their quality as uranium properties were false; that the amount needed to put the Benson Uranium Upgrader into completion was falsely represented, that the Upgrader was in fact without value in the prospective use to which appellants represented it would be put.

Likewise, the jury could believe from evidence adduced before it that false representations were made as to the nature of nickel deposits held by appellants or their associate companies and that false representations were made with respect to the ability of the appellants to sell substantial amounts of timber from lands on which they did not have timber rights. Moreover, the jury could believe

that specific representations as to an interest expressed in the project by a nationally known brokerage and investment house, which was represented to be at least considering offering $18,000,000 for a 49% interest in the holdings, were false. There were other specific representations made which were material according to facts testified to by witnesses which, if believed by the jury, would have justified their finding a verdict of guilt against each of the appellants.

We have carefully considered specific contentions that as to each of the appellants the testimony was insufficient to justify the submission of the case to the jury and we find that there is no merit in this contention.

Prior to the trial the appellants moved for a change of venue. The trial court considered this motion along with others filed at that time. Although it is clear such a widespread activity as had been engaged in by appellants, in which many hundreds of investors had become involved, brought about some newspaper publicity, when the charges were filed in the district court, the trial court decided that a fair and impartial jury could be found to try the case. The Trial Judge noted that the Dallas Division had a population of some 700,000 persons, of whom about 300,000 resided in rural areas. He also offered appellants an opportunity to file additional affidavits which they decided not to do.

The motion for transfer of venue was addressed to the discretion of the trial court and should not be overturned in the absence of a clear showing of abuse. *Greenhill v. United States*, 5th Cir., 293 F. 2d 40[illegible]; *May v. Blackburn*,

5th Cir., 250 F. 2d 645, Cert. Denied. In the Greenhill case we stated, "The decision of the trial court on such a motion will be affirmed where as here no abuse of discretion is shown, and lack of abuse of discretion is buttressed whereas here there was no showing in the course of the voir dire examination that any adverse publicity had affected the ability of the jurors to reach an unprejudiced decision." 298 F. 2d 405, 411. It is to be noted that upon the voir dire in this case the only two members of the panel who stated that they had formed opinions as to the guilt or innocence of the accused were excused.

We think the same principle applies to the contention by the appellants that the trial court erred in not granting their requested charge dealing with the jury's duties with respect to newspaper publicity and their contention that the charge given did not adequately caution the jury to keep their minds from from outside influences including instructions not to read the newspapers. The Supreme Court in the recent case of *Marshall v. United States*, 360 U. S. 310. at page 312, set out the rule which is applicable to the problem of prejudicial press commentary:

> "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Generalizations beyond that statement are not profitable, because each case must turn on its special facts."

We have carefully considered all of the comments made by the trial court on the several occasions when he cautioned the jury not to read the newspapers and not to base

their decisions on anything other than the evidence adduced on the trial and we conclude that the appellants have made no showing that in this respect the trial court abused its discretion.

On the first day of the case, the court gave the following instruction to the jury:

> "We have some fine enterprising newspaper here and they like a good story, and if they run across that witness on the outside they may get all of his story and print it, and nobody can blame them for it. But it is not sworn to, and yet it may bear on this case and you may read it. The only thing I can say to you is that we must either lock you up and shut you off from the newspapers and keep you together until this trial is over, or else put you on your honor not to listen to anybody's conversation, and not to read any part of a newspaper that relates to this trial until it is over."

The court then followed this language by the statement that if the jurors did read the newspaper and found themselves tempted to talk about it, it would be necessary for the court to lock them up during the rest of the trial.

At the end of the case, the court also instructed the jury in part as follows:

> "If during the trial or from any ruling of the Court during the proceedings you have reached any idea as to what the Court thinks or believes as to the guilt or innocence of the accused you will

> disregard that because you are the judges of the fact, and the Court, that is, the judge on the bench, is the judge of the law. The verdict must be your own and not what the judge or someone else may think or believe. You will, therefore, not accept the law from the lawyers or from any other source, except from this charge, which is now given you, *and you will not accept any evidence except that which has been given you here from the witness stand.*"

Again, later in the charge, the Court stated:

> "I want to again express my approval of the attention you have given in this long trial and in that connection I would like to say that the press, *you remember in the beginning of this trial, I cautioned you against taking as evidence some statement that is contained in the press which may be in addition to the evidence*, and so far as we have seen there has been no act on the part of the press that would be subject to criticism, there has been nothing in them (the press) that you didn't know, if you had read them."

We believe that this instruction was adequate for the purpose of cautioning the jury not to read newspapers dealing with the trial and not to consider anything other than the sworn testimony in the making up of their verdict. *Apodca v. United States*, 5th Cir., 200 F. 2d. 775, 777; *Ford v. United States*, 5th Cir., 233 F. 2d 61. From this, we think, it follows that there was no error in the Court's failure to charge in the specific language sug-

gested by appellants' requested charge. Moreover, no exception was taken by appellants to the failure of the trial court to give this charge, as we have held is required to preserve such ground of appeal. *Estep v. United States*, 5th Cir. 223 F. 2d 19, 22, Cert. denied, 350 U. S. 863. In that case we stated, "Under that rule [Rule 30 F. R. Crim. p. 18 U.S.C.A.], in order to put the trial court in error, it is necessary that the defendant precisely state the ground of his objection and that the ground stated point out an error prejudicial to the defendant."

There is no merit in the ground of appeal criticizing the admission into evidence of a tape recording of a conversation or speech made by Addison. It was a tape recording which was made by one of the invited guests by the use of a small radio which was tuned in with a receiving instrument that made a mechanical transcription of the speech. Appellants do not dispute the general proposition that such a tape recording is admissible in evidence. Their principal objection is that approximately one-half of the tape was defective and the speech or conversation recorded there was not available for the trial. We agree with what was said by the Court of Appeals for the Third Circuit in *United States v. Schneiderman*, 150 F. 2d 941, 944, "There would be no more valid reason for exclusion of the mechanically recorded conversations than there would be for excluding competent conversations, overheard in part, by human witnesses." See also *Monroe v. United States*, 234 F. 2d where at page 55 the Court said, "Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible, and the decision should be left to the sound discretion of the trial Judge." Here there was ample basis for the trial court's

finding that the part that was reproduced was an accurate reproduction of the conversation it purported to reproduce.

Appellants complain in a sort of catch-all ground for reversal that . . . "the cumulative effect of substantial prejudicial errors in the course of the trial below denied defendants of fair and impartial trial." Under this general comment, the appellants speak of the eliciting of inflammatory and prejudicial testimony by the prosecution, coupled with its unfair questions and comments, under which heading they complain of leading questions by Government counsel, some of which were objected to, some of which went unchallenged. They complained that the questions answered by some of the witnesses indicated the extreme hardships suffered by them as a result of their investments with the Addison scheme. Some of these bits of personal experience were clearly consistent with the testimony of other witnesses to the effect that Addison and his associates promised to certain non-compensated employees to provide for their personal maintenance and to others the payment of doctor's bills and hospital fees and to others that their children would be the best dressed children in school, etc. Another subdivision, under this heading, complains that the trial court . . . "in its rulings on evidence, its comments from the bench, and its handling of the speed and conduct of the trial, substantially prejudiced defendants' rights to a fair and impartial trial." We have carefully examined the criticized portions of the record and recognizing that here was a record of 2400 pages of trial testimony extending for nearly a month, we conclude that there is no basis for implying that the trial court so favored the prosecution in the method of his handling of the trial as to work any prejudice to the defendants.

In discussing the foregoing basis for appeal, the appellants state, "It is conceded that perhaps no single one of the errors set forth below would itself warrant reversal, but it is submitted that en masse they constituted prejudicial and reversible error." Appellants cite the case of *Getchell v. United States*, 282 F. 2d 681, 5th Cir. to support this contention. Reference to the Getchell case will show that the Court there considered that the Government's case against the accused was weak in the extreme. The weakness of the proof was referred to by the Court in causing it to feel that the errors there committed, while possibly not individually strong enough to work a reversal did, cumulatively, indicate that the accused may have been convicted by the jury on something other than the proper inferences to be drawn from the sworn testimony. Here we have no such situation. This is not a weak case against the appellants. There is ample evidence to support the jury's verdict as to the representations and as to the falsity of sufficient representations to constitute fraud, and, in those counts which require it, as to the mailings in furtherance of the scheme. In such a situation we take the law to be as recently stated by this Court in *John G. Ahlstedt v. United States of America*, No. 19556, 5th Cir. No. 19556 decided February 27, 1963. There we said:

> "While language has occasionally cast this [28 U.S.C.A. § 2111] in terms of a reversal unless non-prejudicial effect 'affirmatively' appears, . . . the Supreme Court has pointed out in Kotteakos v. United States, 1946, 328 U. S. 750, . . . that in criminal cases the question is what effect the error had or reasonably may be taken to have had upon the decision of the jury. That

decision teaches that an appellate court must determine what the error meant to the jury in relation to all else that happened and:

> 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.' "

See also *Glasser v. United States*, 315 U. S. 60, 83.

> "The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting."

We have given careful consideration to these contentions of prejudicial error, no one of which rises to the dignity of being prejudicial in and of itself, and conclude in the context of the long trial, most of which was conducted in an exemplary fashion by both court and counsel, that such errors as occurred did not influence the jury. Since they did not affect the substantial rights of the parties we conclude that this ground of appeal cannot be supported.

Appellants contend that a seizure and impounding of defense files and records "during the course of the trial" deprived the defendants of their right to counsel, their right to a defense and due process of law. They contend that on the motion of the Referee in Bankruptcy, the files

and records were taken into custody by the United States Marshal when the defense "had been under way but a few days." In their brief they contend that the defense had not completed its case. The record is silent as to when this act occurred. It is plain, however, that no complaint was made about it by the appellants until February 15, 1962, *which was one day after both parties announced that their cases had been closed.* Appellants filed a motion for mistrial charging this seizure, but the motion itself is silent as to when the seizure took place. The Government contends in its brief that the seizure did not occur until the morning of February 15th. So far as it appears from the record, the trial court did not pass on this motion. Clearly, if the point is to have any substance it must be supported by the record. However, in the absence of any record proof to support appellants' contention, the Government again filed its motion to supplement the record by undertaking to show the true facts. Since we do not pass upon the validity or the propriety of such a proceeding because of the failure of the appellants to support their contention by record references, it is not necessary to point to the findings of the trial court upon the supplemental hearing[1] to warrant our holding that there is no merit in this contention.

It is plain that the indictment adequately charged the offenses, the evidence adequately warranted the jury's determination that each of the defendants played his assigned role in the schemes outlined and it does not appear that any prejudicial error occurred during the long trial.

[1]The proof offered by the Government and accepted by the trial court as true was to the effect that both sides had announced that their cases had been closed the day before the Marshal took custody of the records.

The judgment of conviction and the sentences must therefore be

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By G. F. GANUCHAUX
Deputy

New Orleans, Louisiana

Oct. 24, 1963

UNITED STATES CONSTITUTION, 4th AMENDMENT—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

• • • •

UNITED STATES CONSTITUTION, 5th AMENDMENT—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

• • • •

UNITED STATES CONSTITUTION 6th AMENDMENT—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

* * * *

TITLE 28, U.S.C., §753(b)

One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall

promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request. He shall also transcribe and certify all pleas and proceedings in connection with the imposition of sentence in criminal cases and such other parts of the record of proceedings as may be required by rule or order of court.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

* * * * *

TITLE 28, U.S.C., §2071—Rule-making Power Generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

* * * *

TITLE 28, U.S.C., §2106—Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

* * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

* * * *

RULE 2—Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

* * * *

RULE 37(a)(1)—Notice of Appeal

An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the

name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

* * * * *

RULE 39(a)—Supervision in Appellate Court

The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

* * * * *

RULE 39(b)(1)—The Record on Appeal—Preparation and Form

The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

* * * *

RULE 44—Assignment of Counsel

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

* * * *

RULE 51—Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires he court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of any objection does not thereafter prejudice him.

* * * *

RULE 57—Rules of Court

(a) Rules by District Courts and Courts of Appeals

Rules made by district courts and courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Court, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure not Otherwise Specified.

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

FEDERAL RULES OF CIVIL PROCEDURE

* * * *

RULE 75—Record on Appeal to a Court of Appeals

(a) Designation of Contents of Record on Appeal.

Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained

in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

* * * *

(d) Statement of Points

No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

* * * *

(h) Power of Court to Correct or Modify Record

It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is trans-

mitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

* * * * *

(n) Appeals When No Stenographic Report Was Made

In the event no stenographic report of the evidence or proceedings at the hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

May 17, 1962

Post Office Box 23
New Orleans 6, La.

Edward W. Wadsworth, Clerk
Mr. Stanley Jay Bartel
Attorney at Law
Alfred I. du Pont Building
Miami 32, Florida

Re: No. 18,902 — John Milton Addison, Et Al
-vs- United States of America

Dear Sir:

Your letter of May 10 and Motion to Strike have been presented to the Court, and I am authorized by the Court to advise that it is not possible to arrange a hearing of a motion to strike evidence or any similar pleading in advance of the hearing of the case at the time it is set on the docket. The motion will be submitted at the same time the case is submitted on the merits. If the Court concludes that the evidence was not properly in the record, it will be stricken and, if it seems proper, adjustment will be made in the matter of court costs. The parties may handle this question as a part of their main briefs or by separate briefs, and a brief allowance of time will be made for presenting the question on the date of the hearing. If it should be decided that the challenged evi-

dence is properly in the record, opportunity will be given the appellants to supplement the record in accordance with the Rules.

Yours very truly,

E. W. WADSWORTH
EDWARD W. WADSWORTH,
Clerk

cc: Mr. Robert H. Fower
Mr. Fuller Warren
Mr. W. B. West
Mr. Robert S. Travis

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 15,712 CRIMINAL

UNITED STATES OF AMERICA
vs.
JOHN MILTON ADDISON, Et Al

MOTION FOR MIS-TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the defendants in this cause and file this their motion for mis-trial, and for grounds therefor would show the Court as follows:

I.

Due to the fact that the voluminous books, records, and exhibits of the defendants needed in the defense of this cause could not be housed in the offices of their attorneys, their attorneys requested of the Post Office Department of the United States Government space and room in which to store same for the use of their attorneys during the trial of this cause, said rooms being rooms 421, 422, and 436 of the Post Office Building; further, that all of the said books, records, and exhibits were turned over to the attorneys for the defendants in this cause for their use in the defense of the defendants and became privileged by reason of attorney-client relationship.

II.

That before the conclusion of the trial in this cause, wherein said books, records, and exhibits were being used and would be used in the defense of the defendants, the Honorable Elmore Whitehurst, upon application of one William J. Rochelle, Trustee in Bankruptcy in the matter of John Milton Addison, Bankrupt, No. 4781 in Bankruptcy, did "order, adjudge and decree that pending hearing hereon the United States Marshal for the Northern District of Texas or any Deputy Marshal in and for such district to whom this order is presented is authorized and directed to impound all of the books and records in Rooms 421, 422, and 436 of the Federal Building, Dallas, Texas, and to permit no person to remove any of such records from said rooms without an order of this Court," said Elmore Whitehurst, Referee in Bankruptcy, being an arm of this Court.

III.

That by reason of such action on the part of the Referee in Bankruptcy the defense of these defendants was and is hindered and harassed, and too much hardship is placed upon them to go forward in this cause by reason of the seizure and impounding of said books and records as described hereinabove, and said order is tantamount to an order impounding all books, records, and exhibits of the defendants in the possession of the attorneys for the defendants, in as much as said books, records, and exhibits were in the possession of the attorneys for the defendants in this cause and would be used during the course of this trial as well as in any

appeals, if necessary, which said order was served before the conclusion of this said trial.

WHEREFORE, for the reasons set forth hereinabove, the defendants move the Court for a mis-trial in this cause, in order that upon another trial thereof they will not be hindered, harassed, and prevented from presenting a proper defense as provided under the Constitution of the United States.

Respectfully submitted,

LESTER L. MAY & LAMAR HOLLEY
EDWIN M. SIGEL
BERNARD WHITTEN, ROBERT POWER, ROBERT DAVIS

By LESTER L. MAY
Attorneys for Defendants.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	10
Conclusion	16

CITATIONS

Cases:

Brown v. *United States*, 314 F. 2d 293 — 13
Greenhill v. *United States*, 298 F. 2d 405 — 15
Lawn v. *United States*, 355 U.S. 339 — 11
Linden v. *United States*, 254 F. 2d 560 — 15
Lonergan v. *United States*, 95 F. 2d 642, certiorari denied, 304 U.S. 581 — 15
Marshall v. *United States*, 360 U.S. 310 — 15
Nardone v. *United States*, 308 U.S. 338 — 11
Parrott v. *United States*, 314 F. 2d 46 — 13
Stephens v. *United States*, 289 F. 2d 308 — 13
Strauss v. *United States*, 311 F. 2d 926, certiorari denied, 373 U.S. 910 — 13
United States v. *Costello*, 255 F. 2d 876, certiorari denied, 357 U.S. 937 — 11

Statutes and Rules:

15 U.S.C. 77e(a)(2) and 77e(c) — 2
15 U.S.C. 77q(a) — 2
18 U.S.C. 371 — 2–3
18 U.S.C. 1341 — 2

717-825—64

Statutes and Rules—Continued

Page

28 U.S.C. 753(b) 12, 14

Federal Rules of Civil Procedure:

Rule 75(h) 3, 8, 13

Rule 75(n) 13

Federal Rule of Criminal Procedure:

Rule 39(b)(1) 3, 8

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ, AND MILES A. WHITE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–19) is reported at 317 F. 2d 808.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1963, and a petition for rehearing was denied on September 12, 1963. By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to and including

November 11, 1963. The petition for a writ of certiorari was filed on November 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether illegally procured evidence was introduced against petitioners at the trial.

2. Whether petitioners were denied access during the trial to files and records which were impounded pursuant to a bankruptcy order.

3. Whether petitioners were prejudiced by the court reporter's failure to record the arguments of counsel to the jury.

4. Whether the trial court committed any other prejudicial error justifying reversal.

STATEMENT

A jury convicted petitioners in the United States District Court for the Northern District of Texas, under seven counts of an indictment[1] charging them with mail fraud in violation of 18 U.S.C. 1341, under four counts charging them with stock fraud in violation of 15 U.S.C. 77q(a), and under one count charging them with conspiracy in violation of 18

[1] The indictment contained twenty-four counts, each of which named the six petitioners and four others as defendants (R. 2417–2462). Four other defendants were not tried; ten counts of the indictment were dismissed on motion of the government; and the jury found petitioners not guilty on two counts charging violations of 15 U.S.C. 77e(a)(2) and 77e(c) (R. 2417–2462, 2816–2821, 2864–2875, 3241–3242).

U.S.C. 371 (R. 2417–2462).[2] Each petitioner was sentenced to a term of imprisonment, and, except for petitioner Groom, each was fined (R. 2864–2875).[3] The convictions were unanimously affirmed by the court of appeals (Pet. App. 1–19; 317 F. 2d 808).

The pertinent facts may be summarized as follows:

1. The scheme devised by petitioners consisted of obtaining "loans" from various persons throughout the country by representing that large sums of money could be earned from petitioners' ownership of uranium deposits and control of the patents on an invention which could transform low-grade uranium ore into a marketable product. Before 1957, petitioners represented to prospective lenders that petitioner Ad-

[2] The record contains nine volumes, the pages of which are numbered consecutively 1–3400, and the several briefs filed in the court of appeals. Volume eight (pages 2895–3225) consists of a transcript of a hearing in the district court to supplement the record pursuant to Rule 39(b)(1) of the Federal Rules of Criminal Procedure and Rule 75(h) of the Federal Rules of Civil Procedure. Since petitioners contest the validity of the procedure used to supplement the record, references in this brief to volume eight have been distinguished from references to other portions of the record. Volume eight has been referred to as "Supp. R.," and the other portions of the record have been referred to as "R."

[3] The sentences received by petitioners were consecutive on some counts and concurrent on others. The total time to be served and fines to be paid by each petitioner are as follows:

Addison—15 years, $36,000.
Olson—2 years, $5,000.
Groom—5 years.
Scoggins—2 years, $5,000.
Metz—2 years, $5,000.
White—7 years and 1 day, $21,000.

dison and his associates owned vast holdings of property (some 200,000 acres) rich in marketable uranium ore, and that the brokerage firm of Merrill Lynch, Pierce, Fenner & Beane had offered $18,000,000 for a 49 percent interest in these holdings (*e.g.*, R. 35–37, 240–241). Before the sale could be completed, petitioners required a small sum of money, usually represented to be about $75,000, in order to perform certain mining operations (*e.g.*, R. 35–37). Then petitioners would solicit loans at 6 percent interest which were to be repaid within ninety days, when the sale to Merrill Lynch was to take place (*e.g.*, R. 37–38). As further consideration for the loan, the lender was to receive a specified percentage of gross sales of all products developed by petitioner Addison within the next fifty years, and petitioner Addison would purchase life insurance in the amount of the loan naming the lender as beneficiary (*e.g.*, R. 37–38, 57–58). The lenders were told that they would all be millionaires (*e.g.*, R. 38).

In the summer of 1957, the scheme was altered. As of that time, new loans, as well as renewals of old loans, were solicited through representations that, although the sale to Merrill Lynch had not materialized—it was said that petitioner Addison refused to sell when the brokerage firm demanded a controlling interest in the enterprise—even more money could be earned through petitioner's ownership of the patents on the invention called the Benson Upgrader which would upgrade the uranium content of ore five to ten times (*e.g.*, R. 270–275, 364–365). Specifically, it was

represented that petitioner Addison, with the backing of the family of Clint Murchison, a nationally known financier, had formed a corporation entitled Murchison Ventures, Inc., which would manufacture and lease Benson Upgraders (*e.g.*, R. 42–43, 111, 276–277). It was claimed that the invention would revolutionize the uranium industry, and could be leased to uranium mills which manufacture "yellow cake" (the form in which uranium ore is sold to the Atomic Energy Commission) (*e.g.*, R. 42–43, 271–273, 321, 369). This invention, it was represented, had rendered obsolete existing processes of making "yellow cake" (*e.g.*, R. 49–50, 272–273). Petitioners estimated that the leases would yield daily profits of $50,000 to $86,000 (*e.g.*, R. 43, 109, 321, 364). However, before production of Benson Upgraders could begin, a small sum of money was required for incidentals or for an attachment to the upgrader (*e.g.*, R. 111, 274). Each lender would enter a written agreement reciting that petitioner Addison would repay the loan within one year at 10 percent interest, and that the interest was the sole consideration for the loan. Accompanying the written agreement were oral representations: first, that the loan would be repaid in a lesser time, usually thirty or ninety days; and second, that the lender would receive an unspecified percentage of future profits provided he retained faith in petitioner Addison and did not talk to lawyers or law enforcement officials (*e.g.*, R. 44–64, 117, 269–276, 365–381). The lender would also be told that the promise to pay a percentage of the profits could not be embodied in the

written agreement because petitioners did not possess the licenses required by state laws to sell securities (*e.g.*, R. 51–64).

Included in the scheme were representations that petitioners owned properties with timber valued at $1,000,000 as well as the largest vein of nickel in North America (R. 108–109, 331, 364). To some lenders, representations were made that the Atomic Energy Commission had valued one of petitioner's uranium mines at $1,500,000 or $2,000,000 (*e.g.*, R. 35, 112–113). Those without money to lend were asked to participate in the scheme by working for petitioners without salary in Denver, Colorado, or at their various properties (*e.g.*, R. 411–438, 664–686). As a reward for their faith in petitioner Addison, these workers were promised back salaries and a large percentage of future profits (*e.g.*, R. 411–438, 664–686). Another component of the scheme consisted of the representation that petitioner Addison was building a large resort hotel, named the "Dolly-O" in honor of his mother, on a plateau overlooking Denver (*e.g.*, R. 371–372). It was said that, at the groundbreaking in thirty or ninety days, special trains would transport lenders to the hotel for a "pay-off celebration", at which time the loans and interest would be paid, and each lender would be given a new ten-dollar bill which he would take to petitioner Addison, sitting on a stage in a large auditorium, and exchange for a document entitling him to a percentage of all present and future profits (*e.g.*, R. 379–380).

2. Petitioners moved to suppress files and records, including a record of all persons who had loaned money to petitioners, which had been seized by state authorities. At the pre-trial hearing on the motion to suppress, it was shown that the state authorities had acted pursuant to a search warrant later found invalid by a state court (R. 2519–2626, 2568–2569). The testimony also showed that federal officers inspected the records and compiled a list of lenders (R. 2546–2549, 2564–2565, 2585–2586). The records were in the possession of the United States Attorney for three or four months, and he removed seven letters from the files before returning them to state authorities (R. 2549, 2552, 2586–2587). Except for the seven letters and some personal effects previously returned to petitioner Addison, state authorities brought all the seized records to the hearing and placed them at the disposal of the district court. The record shows that the state officials seized ten file cabinets; that in order to facilitate transportation of the records, the contents of eight cabinets were transferred to the remaining two; that two cabinets containing all of the seized records were brought to the hearing; and that the eight empty cabinets were at the place of storage and would be produced at the request of either party of the court (R. 2532–2533, 2542–2544, 2552). The seven letters were introduced into evidence at the hearing by the United States Attorney (R. 2586–2587). Evidence at the hearing also showed that state and federal agencies had been investigating

petitioners' activities prior to the disputed search and seizure (R. 2587–2588). Over petitioners' objections, the government introduced into evidence at the hearing the list of lenders whose identities had been learned through examination of the seized records rather than through the earlier investigations (R. 2585–2588, 2614–2616).[4]

The district court overruled the motion to suppress without prejudice to its renewal at the trial (R. 2723–2724). When the trial opened, petitioners' counsel stated that the motion to suppress was being "carried along," but no objection was made to the introduction of particular evidence because of the search and seizure (R. 28).

3. Petitioners' brief in the court of appeals asserted that (a) the court reporter did not record the examination of the veniremen or the arguments of counsel to the jury (p. 14); (b) the grand jury used the records seized by the state authorities (pp. 20–21); (c) illegal evidence was received at the trial (pp. 103, 105, 107, 110–113, 115–116); and (d) defense files were impounded pursuant to a bankruptcy order on a day when defense witnesses were testifying, and petitioners were denied access to them (pp. 95–101).

Since the record did not reflect the basis for these contentions, the United States Attorney moved in the district court to supplement the record pursuant to Rule 75(h) of the Federal Rules of Civil Procedure, made applicable to criminal cases by Rule 39(b)(1)

[4] We have lodged this list, Gov. Ex. 1 at the hearing, with the Clerk of the Court.

of the Criminal Rules. After a hearing, the district court ordered the record supplemented and submitted to the court of appeals. The record, as supplemented, shows: (a) that the examination of the veniremen had been recorded but not transcribed because petitioners had not designated it as part of the record (Supp. R. 2965–2968, 3037–3038).[1] Counsel for each defendant had informed the court reporter that it would not be necessary for him to record the jury arguments and petitioners had made no objection to the government's argument (Supp. R. 2965–2968, 3038). (b) The records seized by state authorities were not used by the grand jury (Supp. R. 2919, 2934–2936, 2987–2988, 3038). (c) Except for personal effects returned to petitioner Addison, all files and records seized by state authorities were introduced at the hearing of the motion to suppress evidence. Since the date of the hearing to suppress evidence, until well after the trial, the seven letters were in the custody of the clerk of the court, and the other evidence seized was in the custody of the marshal. None of the seized evidence was introduced at the trial (Supp. R. 2919, 2934–2940, 2945–2948, 2952–2954, 3038–3039).[2] (d) Pursuant to a bankruptcy petition, the United States Marshal impounded records belonging to petitioner Addison on February 15, the day after both

[1] The examination is now part of the record (R. 3226–3281).

[2] Testimony at the hearing on the motion to supplement the record showed that, at the conclusion of the pretrial proceedings on the motion to suppress, the court, in the presence of counsel for petitioners, directed the marshal to take custody of the seized records and lock them up (Supp. R. 2940, 3039).

the government and defense rested their cases. On that day counsel for petitioners were told by the district judge that they would be "afforded access to any records upon request" (Supp. R. 3033–3034, 3039–3040, 3217–3223).

The court of appeals affirmed the conviction. The affirmance was not based on the evidence contained in the supplemental record (Pet. App. 5, 7–8, 18).

ARGUMENT

1. Petitioners' contention (Pet. 7–16, 20–24) that the trial was tainted by illegally obtained evidence is without foundation. Nothing in the record, original or supplemental, indicates that either the physical evidence seized by the state officers or its fruits were used at the trial.

At the hearing on the motion to suppress evidence, the government showed the independent origin of the evidence which it introduced at the trial by producing at the hearing on the motion to suppress a list of the lenders whose identities had been learned through inspection of the records seized by the state. Of the 15 or more investors who testified at the trial, the names of only two appear on the list: William F. Stroud (R. 1762–1843) and Mrs. Inez Huie (R. 523A–554). The inclusion of Stroud's name on the list was an oversight since he testified at the trial that federal investigators had interviewed him on June 3, 1959, which was seven days before the state seizure occurred (R. 1796, 2530–2531). As to Mrs. Huie, two other witnesses, whose names were not obtained from state records, knew her intimately and knew that she had loaned money to

petitioners (R. 523A, 526, 533, 554, 580). The government would, therefore, have almost certainly learned of her identity even if the seizure by state officers had not occurred.

In the face of this showing by the government, petitioners had the duty of objecting to specific evidence which the government introduced in order to claim that they were convicted on the basis of tainted evidence. See *Lawn* v. *United States*, 355 U.S. 339, 355–356; *Nardone* v. *United States*, 308 U.S. 338, 341; *United States* v. *Costello*, 255 F. 2d 876, 880 (C.A. 2), certiorari denied, 357 U.S. 937. They made, however, no objection at the trial beyond the general assertion that the motion to suppress was being "carried along." They have not either in the court of appeals or in this Court pointed to any evidence based on the illegal state search.

It was thus unnecessary, as the court of appeals found, to rely upon the supplemental record to refute petitioners' claim that tainted evidence was introduced. The supplemental record merely serves to support what the trial record makes evident, that none of the physical evidence seized by the state authorities was used at the trial.[7]

---

[7] Petitioners state (Pet. 10) that eight of the ten filing cabinets, which had been illegally seized, disappeared. Even if this were true, this would not justify reversal of their conviction since no tainted evidence was introduced and petitioners do not state that they needed these materials for any trial purpose. It would merely mean that petitioners were entitled to their return. Moreover, the record of the pre-trial motion to suppress, as well as of the supplemental record, shows that no evidence disappeared.

2. Nor does the record support petitioners' claim (Pet. 16–17, 25–27) that they were denied assistance of counsel because defense files were impounded in the middle of the trial pursuant to a bankruptcy order. Petitioners made no such assertion while they were putting in their defense; the only reference in the original record to this matter is a motion for mistrial which was filed on February 15, 1961, the day after all the parties rested their case (R. 2302, 2337–2339, 2790–2791). The original record does not indicate when the impounding occurred, the nature of the materials impounded, or whether the impounding deprived petitioner of access to the materials. On the other hand, the supplemental record shows that the impounding occurred on the day after the parties rested and that, even after that date, the impounding in no way restricted petitioners' access to the materials (Supp. R. 3033–3034, 3039–3040, 3217–3223). Thus, on the original record, petitioners' allegations are made without foundation; on the supplemental record they are shown to be untrue. Either way, the claim is without merit.

3. There is no merit to petitioners' contention (Pet. 27–29) that the court reporter's failure to record the arguments of counsel to the jury entitles them to a new trial or, in the alternative, to a hearing on whether the failure was prejudicial. The court reporter has a statutory duty to record these arguments (28 U.S.C. 753(b)) but the mere fact that the arguments were not reported is not *per se* reversible error. Petitioners must show a substantial claim that substantive error occurred during the jury arguments

which could not be presented for appellate review without a transcript. *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9); *Strauss* v. *United States*, 311 F. 2d 926 (C.A. 5), certiorari denied, 373 U.S. 910; cf. *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5); *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10). In the instant case, petitioners did not object at trial to the government's summations, and do not now point to any particular error occurring during these summations.*

Petitioners' reliance on *Brown* v. *United States*, *supra*, for their contention that they should have been allowed to supplement the record is misplaced. In that case, where the jury arguments were not reported, the court of appeals held that a new trial would not be granted to an accused who did not claim that error occurred during the unreported proceedings, and that if the accused alleged that prejudicial error occurred during the unreported arguments, he was required to use Rule 75(n) of the Federal Rules of Civil Procedure to create a record as to what had occurred. In fairness to the defendant, the court postponed affirming the conviction until after the accused had had an opportunity to use Rule 75(n) in the district court. The rationale of *Brown* is not applicable to this case, for here a Rule 75 hearing has already been held—the hearing to supplement the record pursuant to Rule 75(h), which is the equivalent

* While it is true that petitioners characterize the government's argument as "inflammatory" (Pet. 17, 27), they make no attempt to support this broad conclusion or complain of any specific error in the arguments.

of the hearing contemplated by Rule 75(n). Not only have petitioners refused to invoke Rule 75 in the district court, but they opposed the government's efforts to accomplish the same end—to make the unreported proceedings a matter of record.[9] Since petitioners had ample opportunity to invoke Rule 75, there was no reason for the court of appeals to have postponed disposition of the instant case.

4. The other contentions advanced by petitioners (Pet. 16, 17, 25, 29) are plainly frivolous. The court of appeals had no need to rule on petitioners' motion to strike the supplemental record because the court did not find it necessary to rely on the supplement in affirming the convictions (see Pet. App. 5, 7–8, 18). Similarly, none of the arguments we have made above depend on the supplemental record. As we have shown, that record merely confirms that petitioners' contentions are without merit.

Petitioners' examination of the veniremen showed that newspaper publicity did not in fact influence the jury, and the district judge was diligent in his efforts to insure that newspaper publicity did not adversely affect the trial, such as by telling the jury not to read any newspaper stories concerning the case (R. 23–25, 2761–2768, 3234–3264). It is well established that the trial court has broad discretion in determining

[9] The supplemental record made on the government's motion in the district court shows that 28 U.S.C. 753(b) was not violated at all. The supplemental record shows that petitioners waived their right to have the summation transcribed. It was proper to supplement the record on this point since such a matter does not normally appear in the original record.

whether a change of venue is required and whether the defendant has been prejudiced by newspaper publicity during the trial. *E.g., Marshall* v. *United States*, 360 U.S. 310, 312; *Greenhill* v. *United States*, 298 F. 2d 405 (C.A. 5). Here, there was no abuse of this discretion.

Petitioners' objections to rulings by the court allowing the admission of evidence are also without foundation. Testimony that one lender intervened in a civil suit brought against petitioners by the federal government was part of a showing that after the intervention petitioners paid the sums due to the lender in return for his absolving them from liability (R. 163–173). This testimony was relevant since the fact that a lender has been repaid bears on whether the borrower intended to commit fraud. *Linden* v. *United States*, 254 F. 2d 560, 566 (C.A. 4); *Lonergan* v. *United States*, 95 F. 2d 642, 646 (C.A. 9), certiorari denied, 304 U.S. 581. Here the lender was repaid, but the conditions under which this was done were relevant to petitioners' intent. Evidence that an unsalaried worker opened a charge account at a dry goods store in order to obtain clothing for his daughter, and that petitioners refused to supply medical treatment for his wife, was relevant to show the falsity of petitioners' representations that unsalaried workers would be given free school clothing and medical treatment (R. 677–680, 684). Testimony of another witness that he was promised greater rewards if he would sell his home and lend the proceeds to petitioners was relevant in relation to the representations that a lender's share of the profits would depend upon

how great a sacrifice he had made (R. 766–767). It was not hearsay to admit testimony about a conversation held in the presence of petitioner White (R. 740–741). Testimony about the size of a hotel bill charged to petitioner over an eleven-month period was relevant to show the scale of the operation (R. 817). Any possible error in admitting evidence that a state agency ordered petitioners to cease their activities was cured by the court's instructions to the jury (R. 1806–1810). As for petitioners' other objections, either the court excluded the evidence to which petitioners objected (R. 160, 246–249, 843–851, 1800–1801, 2088), or the questions were not answered (R. 1058–1060, 2083–2084), or petitioners made no objection (R. 1092).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
T. WIESEMAN,
Attorneys.

JANUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

No. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ and MILES A. WHITE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES L. GUILMARTIN
STANLEY JAY BARTEL
GEORGE ELIAS, JR.
GUILMARTIN and BARTEL
1527 Alfred I. duPont Building
Miami, Florida 33131

FULLER WARREN
811 Ainsley Building
Attorneys for Petitioners

INDEX

	Page
PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI	1
REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT	2
CONCLUSION	9
CERTIFICATE OF COUNSEL	10
APPENDIX	App. 1
"A" — Affidavit of Robert H. Power, Esquire, Trial Counsel	App. 1
— Affidavit of James L. Guilmartin and Stanley Jay Bartel, Appellate Counsel	App. 4
"B" — Excerpts of Testimony at Supplemental Hearing	App. 6

TABLE OF CASES

	Page
Brown v. *U. S.*, 314 F.2d 293 (C.A. 9th)	6
Burns v. *Ohio*, 360 U.S. 252	7
Carnley v. *Cochran*, 369 U.S. 506	7, 8
Coppedge v. *United States*, 369 U.S. 438	7
Douglas v. *California*, 372 U.S. 353	4, 7
Draper v. *Washington*, 372 U.S. 487	4
Ellis v. *United States*, 356 U.S. 674	4
Eskridge v. *Washington State Prison Board*, 357 U.S. 214	4
Fowler v. *U. S.*, 310 F.2d 66 (C.A. 5th)	6
Getchell v. *United States*, 282 F.2d 681 (C.A. 5th)	2
Gideon v. *Wainwright*, 372 U.S. 335	4, 6
Griffin v. *Illinois*, 351 U.S. 12	4, 5, 6, 7
Jeffries v. *State*, 9 Okla Cr. 573, 132 Pac. 823	4, 6
Jencks v. *United States*, 353 U.S. 657	4
Johnson v. *United States*, 352 U.S. 565	4
Lane v. *Brown*, 372 U.S. 477	4
Miller v. *U. S.*, 317 U.S. 192	7

TABLE OF CASES (cont.)

	Page
Parrott v. *U. S.*, 314 F.2d 46 (C.A. 10th)	6
Poole v. *U. S.*, 250 F.2d 396 (CADC)	7, 8
Stephens v. *U. S.*, 289 F.2d 308 (C.A. 5th)	6
Strauss v. *U. S.*, 311 F.2d 926 (C.A. 5th)	6
U. S. v. *Sevilla*, 174 F.2d 879 (C.A. 2)	8
U. S. v. *Smith*, 310 F.2d 121 (C.A. 4th)	6
U. S. v. *Taylor*, 303 F.2d 165 (C.A. 4th)	6, 8

Statutes Cited

28 U.S.C. §753(b)	3, 5, 7
28 U.S.C. §753(f)	5
28 U.S.C. §1915	6

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

No. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ and MILES A. WHITE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that this Court grant rehearing of its Order of February 17, 1964, denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and that a writ of certiorari issue on the point set out below to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the Petition filed November 12, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of February 17, 1964, the petitioners, urging conflicting decisions, sought review, *inter alia*, of the question as to whether the court reporter's failure to transcribe summations, during which the prosecution made improper and inflammatory appeals to the jury,[1] necessitated a new trial. (Pet. 4, 17, 27-29). Not previously presented here are the constitutional and statutory grounds for review arising from the facts surrounding the failure to record the summations, and of which the court below was apprised.

Petitioners, at the time of trial, alleged themselves to be impoverished: Addison was bankrupt. (Tr. 1843); several of the petitioners had filed paupers' oaths and witness fees for defense witnesses were paid by the Government; attorneys' fees and appeal bonds were paid or promised by others; and in the case of Miles A. White, counsel Robert H. Power, was court appointed. (Forma Pauperis Hearing of March 30, 1961 ("F.P.") 2). As set out in his Affidavit (Rehearing Appendix ["Reh. App."] A, *infra*), counsel Power had been admitted to practice for less than three years, and his only Federal Court experience had been one civil case. Consistent with the requirements of State Court practice, Power, during a

[1] The court below, and the Government here, approached the question as being whether the mere failure to record the arguments was *per se* reversible error. Finding that the "record is silent" as to objections by petitioners during trial, and also a failure to set out any improper remarks "in their original brief", the court held the error to be nonprejudicial. (Op. 3) The court below completely ignored, however, the asserted inflammatory remarks described in petitioners' Reply Brief (pp. 15-16), the use of which, even without objection, has required reversal. See *Getchell v. United States*, 282 F.2d 681 (C.A. 5th). Moreover, petitioners have been deprived of their right to establish proof of inflamatory remarks. See paragraph 4, *infra*.

recess just prior to jury arguments, approached the court reporter, T. C. Irby, to request that the summations be recorded. The reporter advised Power that argument would not be recorded since "no one has made prior arrangements for assuring my fee for doing so". Upon being asked if he would pay for the recording, Power, refreshing the reporter's recollection, explained that his client was impoverished and that he had no funds with which to pay for recording of summations. The reporter thereupon indicated that as far as he was concerned the arguments would not be recorded. Being unaware of the Court Reporter Act, Power assumed that the demand for prior fee arrangements was proper and, letting the matter drop, returned to his task of preparing his final argument. And although this demand for pre-payment of recording fees was expressly called to the attention of the Fifth Circuit, during oral argument by counsel Power, it went unconsidered by such court.[2] (Reh. App. A, pars. 6-9; see also Affidavit of James L. Guilmartin and Stanley Jay Bartel, Reh. App. A).

Thus, this is another facet of the numerous cases coming before this Court involving invidious discrimination against the poor solely because of their indigency.

---

[2]The sole testimony to the contrary was submitted more than one year after trial by the court reporter, a man of 70 years (S.R. 76), who was attempting to justify his admitted violation of the statutory requirements of §753(b), 28 U.S.C. During the supplemental hearing the trial court effectively foreclosed an attempt by counsel Power to refresh the recollection of the reporter, with respect to the circumstances surrounding the failure to record summations, by concluding that had Power deemed the matter to be of any importance, he would have so apprised the court. (Reh. App. B; S.R. 86-87) The dispute was apparently disposed of completely upon the reporter's negative answer to the trial court's inquiry as to whether there were any objections to the reporter's inaction. (Reh. App. B; S.R. 89)

See *e.g. Douglas* v. *California*, 372 U.S. 353; *Gideon* v. *Wainwright*, 372 U.S. 335; *Griffin* v. *Illinois*, 351 U.S. 12; *Lane* v. *Brown*, 372 U.S. 477. The pre-payment of fees as a prerequisite to a full and adequate review on appeal has been soundly condemned. (*Griffin* v. *Illinois*, *supra*; *Jeffries* v. *State*, 9 Okla. Cr. 573, 576, 132 Pac. 823) and any procedure which allows the trial court, an officer of the court, or an officer outside the judicial system to deprive an indigent of any hope for a full review of his conviction, based on such indigency alone, is clearly violative of constitutional standards of due process and equal protection of the laws. *Eskridge* v. *Washington State Prison Board*, 357 U.S. 214; *Lane* v. *Brown*, *supra*; *Douglas* v. *California*, *supra*; *Draper* v. *Washington*, 372 U.S. 487. This is true even where the record, as here, is unclear and the errors hidden, and notwithstanding the Government's contention (Opp. Br. 12-13) that petitioners must show "a substantial claim" that substantive error occurred during summation which could not be reviewed without a transcript. This Court, in *Douglas* v. *California*, has just condemned a procedure that deprives an indigent defendant of an adequate review of his conviction in the absence of a showing of preliminary merit to his appeal or that an injustice was committed, which requirement would be avoided by a rich man. Cf. *Johnson* v. *United States*, 352 U.S. 565; *Ellis* v. *United States*, 356 U.S. 674, 675.

2. Having been apprised of the circumstances giving

Compare also *Jencks* v. *United States*, 353 U.S. 657, rejecting a requirement that before an accused can compel production of a third party's report to the F.B.I. to determine whether such report conflicts with the witnesses' testimony, the accused must first show that such a conflict exists.

rise to the reporter's failure to record summations, the court below has decided an important question of federal law involving the administration of criminal justice which has not been, but should be, settled by this Court. Thus, while the law permits a court reporter to require prepayment of estimated cost of transcribing recorded proceedings, expressly excepted therefrom are the costs of transcripts payable by the United States in criminal proceedings because the accused has been allowed to defend or appeal in forma pauperis. 28 U.S.C. §753(f). This presupposes that the reporter will have complied with the mandatory provisions to record all phases of the criminal case. §753(b). If, as the court below in effect held, and the Government contends (Opp. Br. 12-13), a reporter can refuse to record all phases of criminal proceedings because of the inability of any accused to pre-pay the estimated cost of a transcription (should it become necessary for appeal), such accused, upon subsequently establishing his right to appeal in forma pauperis, is effectively deprived of his right to a free transcript under 28 U.S.C. §753(f), so necessary for a full and adequate review of his conviction. And this is of even greater significance where such accused, at the time of trial, in fact may have been reduced to pauper status, although not officially so declared by the court. Such deprivation is of course a denial of due process and equal protection of the laws to the accused solely because of his indigency.[4] *Griffin v. Illinois*, *supra*. Most importantly, however, the decision below not only destroys the plain and simple distinction between the necessity to record and the subsequent tran-

[4] This is equally true where, as here, the petitioners were alleged to be pauper status during trial but were denied the right, after hearing, to appeal in forma pauperis (R.P. 19).

scribing of such recordation,[5] but in effect nullifies §1915, 28 U.S.C., which authorizes proceedings in forma pauperis. Our Constitution and laws have been designed to assure fair trials in which every defendant stands equal before the law (*Gideon* v. *Wainwright*, *supra*), and the forma pauperis statute stands among the first in this aim. However, in the absence of a proper review of the court's holding, the right to appeal in forma pauperis becomes an empty ritual; a free transcript is useless where there is nothing to record.[6]

3. The Government contends, and the court below held, that petitioners could have corrected the error resulting from the reporter's non-compliance with the statute by a Civil Rule 75(n) hearing, but not only did they refuse to invoke this corrective procedure, they also opposed the Government's efforts to utilize the rule to supplement the record.[7] (Op. 4-5; Opp. Br. 13-14). Con-

[5] The reporter is entitled to charge parties only for the transcriptions made from the recordings. It seems clear, however, that the reporter does not go uncompensated for the recording since §753(e) provides for an annual salary, which is in addition to the transcription fees. Cf. *Jeffries* v. *State*, 9 Okla. Cr. 573, 132 Pac. 823, 824.

[6] The frequency with which court reporters have failed to record portions of criminal proceedings in the past few years requires this Court to assert its power of supervision. See e.g. *Strauss* v. *U.S.*, 311 F.2d 926 (C.A. 5th); *Brown* v. *U.S.*, 314 F.2d 293 (C.A. 9th); *Stephens* v. *U.S.*, 289 F.2d 308 (C.A. 5th); *Parrott* v. *U.S.*, 314 F.2d 46 (C.A. 10th); *U.S.* v. *Taylor*, 303 F.2d 165 (C.A. 4th); *Poole* v. *U.S.*, 250 F.2d 396 (CADC); *Fowler* v. *U.S.*, 310 F.2d 66 (C.A. 5th); *U.S.* v. *Smith*, 310 F.2d 121 (C.A. 4th).

[7] The charge that petitioners actually opposed the Government's attempt to use Rule 75 is misleading. Since the supplementation as proposed by the Government related not to evidence and testimony actually adduced during the time of trial, but to extra-judicial evidence, counsel for petitioners, on appeal, objected thereto. In any event, petitioners reserved the right to be heard and submit evidence, but were denied the right by the court below, who deemed it unnecessary to rule on the propriety of the supplemental hearing. (Pet. 18-19; Op. 5). This denial without the right to be heard was a further deprivation of constitutional rights. *Griffin* v. *Illinois*, *supra*, p. 17.

trary to the court's implicit ruling, however, the mere availability of the "civil" proceeding to correct defective records in criminal cases was not intended to cast upon an accused the burden of proof and persuasion on appeal. Cf. *Coppedge* v. *United States*, 369 U.S. 438, 447-448; *Carnley* v. *Cochran*, 369 U.S. 506, 514. To compel an indigent, solely because of his poverty, to assume the burden of supplementing and reconstructing a complete record, if he would have a full and adequate review, casts upon him a burden of proof inconsistent with the established principles of criminal justice and due process of law. *Douglas* v. *California*, *supra*, 355; compare *Griffin* v. *Illinois*, *supra*, p. 17; *Burns* v. *Ohio*, 360 U.S. 252.

4. Again, the court of appeals has so far sanctioned a departure from the usual course of judicial proceedings by a trial court, as to call for an exercise of this Court's power of supervision. As support for its finding of harmless error, the court below held that there was waiver of the recording requirement since the trial court, at the supplemental hearing, found that counsel for "each of the defendants * * * stated to him [the reporter] that they did not wish to have him report the oral arguments." (Op. 4). Such finding was based solely on the affidavit testimony of the court reporter, contradicted on cross-examination (S.R. 79, 80, 88), who was attempting to justify his admitted violation of his job requirements. In view of the unequivocal legislative history and intent behind §753(b) to safeguard the rights of criminal defendants against human infirmities; (see *Miller* v. *U.S.*, 317 U.S. 192; *Poole* v. *U.S.*, 250 F.2d 396, 399 (C.A.D.C.)) it was incumbent upon the trial court to require and assist in a full hearing, including all persons who took part in the proceedings, particularly the six local trial counsel

for petitioners (as noticed by the court below), with each being given an opportunity to testify and re-create an accurate record as to what transpired. *U.S.* v. *Taylor*, 303 F.2d 165 (C.A. 4); *U.S.* v. *Sevilla*, 174 F.2d 879, 880 (C.A. 2); *Poole* v. *U.S.*, *supra*. To the contrary, the trial court was satisfied with the reporter's negative answer to his inquiry as to whether any counsel objected to his "inactivity" (S.R. 89). However, this not only falls far short of the basic standards of waiver in the administration of criminal justice (compare *Carnley* v. *Cochran*, 369 U.S. 506, 512-516) but also improperly casts a fundamentally unfair burden of proof on petitioners,[8] which in the final analysis necessitates the exercise by the Court of its power of supervision.

[8]The burden was especially severe in view of the trial court's observation to counsel, during the supplemental hearing, that "we have such a high regard for the lawyers that come before us in Court, and for the officers of our Court that testify, and when they speak, not under oath or when they speak under oath, we deeply regret when any reflection is cast upon them." (S.R. 115).

CONCLUSION

For the reasons set forth above and in the specified sections of the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted.

JAMES L. GUILMARTIN
1527 Alfred I. duPont Building
Miami, Florida 33131

STANLEY JAY BARTEL
1527 Alfred I. duPont Building
Miami, Florida 33131

GEORGE ELIAS, JR.
1527 Alfred I. duPont Building
Miami, Florida 33131

FULLER WARREN
811 Ainsley Building
Miami, Florida

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JAMES L. GUILMARTIN

STANLEY JAY BARTEL

GEORGE ELIAS, JR.

FULLER WARREN

APPENDIX A

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ and MILES A. WHITE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF ROBERT H. POWER

STATE OF TEXAS)
) ss:
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority duly authorized to administer oaths and take acknowledgements, personally appeared ROBERT H. POWER, who, after being first duly sworn, deposes and says upon his oath that:

1. My name is ROBERT H. POWER.

2. I am an attorney admitted to practice in the State of Texas in 1958.

3. Shortly before the trial of the above cause in the United States District Court for the Northern District of Texas, Dallas Division, I was appointed by the Honorable T. Whitfield Davidson, United States District Judge, to represent one of the defendants in the above-styled cause, MILES A. WHITE, who had been found by the Court to be a pauper.

4. As of the time of this appointment, I had been admitted to practice in Texas for less than three (3) years and had never defended a criminal case in Federal Court. My only Federal Court experience had been one civil case.

5. At the time of this trial, I was twenty-seven (27) years of age.

6. At the close of the testimony, and immediately prior to the commencement of arguments to the jury, I approached the Court Reporter who had been transcribing this trial, T. C. Irby. This was during a recess.

I inquired of the Court Reporter whether final arguments were to be recorded. I made this inquiry because, under state practice, as I then knew it, closing arguments were reported by the Texas State Reporters when requested.

7. When I asked Mr. Irby if the final argument in this case would be recorded, he replied: "No. No one has made prior arrangements for assuring my fee for doing so".

I explained to Mr. Irby that I represented an impoverished client, as he well knew, and that I did not have any funds from my client to pay for recording of the final arguments to the jury.

He thereupon indicated that closing arguments would not be recorded.

8. At the time of this discussion with Mr. Irby, I had been continuously in the trial of this case for some four (4) weeks. I was preoccupied with my own closing argument, which I was then to deliver to the jury within the next several hours.

I did not know at the time of my conversation with Mr. Irby that there was any duty of a court reporter to record closing arguments under the Federal Statutes. I assumed that Mr. Irby's comments regarding prior arrangements for his fee was perfectly proper and I thereupon returned to my task of preparing my closing argument.

9. During the oral argument before the Court of Appeals for the Fifth Circuit in the above cause, I appeared briefly before that Court and explained to the Court what had transpired during the trial proceedings. As I have indicated above, I told the Court of Appeals of Mr. Irby's discussion regarding pre-payment of pre-arrangements as to his court reporter's fees and his failure to record the closing arguments.

ROBERT H. POWER

SWORN TO and SUBSCRIBED before me this day of March, 1964.

Notary Public
State of Texas

My Commission expires:

[TITLE OMITTED]

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned authority duly authorized to administer oaths and take acknowledgements, personally appeared JAMES L. GUILMARTIN and STANLEY JAY BARTEL, who, after being first duly sworn, depose and say upon their oath that:

1. They are and have been appellate counsel for the petitioners herein since shortly after the filing below of the Notice of Appeal to the Court of Appeals for the Fifth Circuit.

2. In the course of their representation of petitioners, they have carefully interrogated ROBERT H. POWER, ESQ., both personally and by telephone, concerning the conversation he had with the Court Reporter below related in Mr. Power's affidavit dated March ... 1964.

3. On each and every such occasion, Mr. Power has consistently held to the version of that conversation related in his affidavit. Deponents firmly and in good faith believe Mr. Power to be accurately relating that conversation to this Court.

4. Both of your deponents were present at oral argument before the Court of Appeals below, during which time Mr. Power, speaking as an officer of that Court, related his conversation with the Court Reporter, in substantially the same manner set forth in his affidavit, to the Court of Appeals.

JAMES L. GUILMARTIN

STANLEY J. BARTEL

Sworn to and subscribed before me this day of March, 1964.

Notary Public
State of Florida at Large

APPENDIX B

CROSS EXAMINATION

[PP. 86-87]
BY MR. POWER:

Q Mr. Irby, I would like to ask you one or two questions, please.

A Sure.

Q I know it has been a long time ago that we were here on this trial and the specific reason of my question is hoping that you can refresh my recollection as to whether I am right or wrong. It is my recollection that at the time when the argument to the jury was about to commence, that you and I had a conversation in the hallway concerning the taking down of these arguments. Do you recall such a conversation?

A No, I don't recall it.

Q Do you recall any comment that you might have made to me wherein you said that no one had said they were going to pay for the taking down of the jury argument?

A I don't think I said that, because I am not entitled to pay for it. I never charge for taking argument.

Q I understand this. I am not trying to say you did.

A When I transcribe them, I charge for it, but I don't think I said that.

Q But your recollection is that you and I had no such conversation?

A I don't know whether we had conversation or not. I just don't remember.

THE COURT: We might ask you, counsel, if you requested the Court to require the court reporter to do that?

MR. POWER: Your Honor, if you will recall, I was just still wet behind the ears, and I sure didn't. I surely didn't. I don't recall requesting the Court to do it, to be perfectly honest with the Court. I just seem to recall having a conversation with Mr. Irby and I am certainly not hearsaying, —

THE COURT: The Court feels if you attach that importance to it, with the diligence that you usually show, you would have come to the Court with it.

MR. POWER: Yes, sir.

[pp. 89]

THE COURT: . . . I might ask him, however, with reference to the argument, if you remained in the room while the case was being argued?

THE WITNESS: I did. I sat right there while the case was being argued for the purpose of taking down any objection or exception to the argument.

THE COURT: Was there any requests made of the Court that the Court Reporter write that down?

THE WITNESS: No.

THE COURT: Report the argument?

THE WITNESS: No request was made.

THE COURT: There was no objection to your inaction?

THE WITNESS: No.